Decisions

# of the

United States Merit Systems Protection Board

Volume 3

July 23, 1980—October 9, 1980

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United States Merit Systems Protection Board

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FOREWORD

We are pleased to publish the second set of Merit Systems Protection Board decision volumes, part of the Board's ongoing program to make its opinions readily accessible and to create a permanent record for research. As an addition to Volumes 1 and 2, and their companion index volume, Volumes 3 and 4 are published as a set, and cover the period July 23 through December 31, 1980. The relevant index is published as part of each volume, rather than as a separate book.

Contents of Volumes 3 and 4 are Board final actions taken under the appellate and original jurisdiction conferred by the Civil Service Reform Act of 1978. Interlocutory actions of precedential value are also included.

Final decisions issued by presiding officials on the Board's behalf in the regional offices are available for review at the central office in Washington, D.C. and at the Board's 11 regional offices. Also, the Board issues a monthly digest of Board orders and list of issuances. All Board issuances may be reviewed at the MSPB Legal Publications Division, Falls Church, Va.

ERSA H. POSTON,
Vice Chair.

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES F. HAYES
v.
NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

Docket No.
AT035199055

OPINION AND ORDER

The appellant filed an appeal with the Atlanta Field Office of the Board from an action by the George C. Marshall Space Flight Center, NASA, reassigning him in the position of Program Analyst, GS-12, from one organizational unit to another, effective September 23, 1979. The presiding official found that the reassignment from one organizational unit to another without any change in grade or pay did not require the agency to follow reduction-in-force procedures. Therefore, he dismissed the appeal as not being within the appellate jurisdiction of the Board.

Appellant has contended that the agency should be required to follow the reduction-in-force (RIF) procedures as the agency originally called the action a RIF and that the reassignment was actually only a tool to force his retirement. The agency asserted that there was no need to follow the reduction-in-force procedures because the appellant had not been released from his competitive level. The appellant was merely moved from one organizational unit to another without any change in grade, position or competitive level.

5 C.F.R. 351.201 (1979) states that each agency shall follow the reduction-in-force procedures "when it releases a competing employee from his/her competitive level. . . ." Since the appellant was not released from his competitive level, the procedures were not applicable.

A reassignment from one organizational unit to another without a change in grade, pay or competitive level is not applicable under 5 C.F.R. 1201.3 (1979). Therefore, the Board finds that the presiding official's dismissal of the appeal for lack of jurisdiction was not error.

The Board may grant review under 5 C.F.R. 1201.115 (1979) if it is established either that there is new and material evidence available which was not available when the record closed or that the presiding official erred in an interpretation of a statute or regulation. The appellant in his petition for review has not produced any new and material evidence or shown error in the presiding official's interpretation of a statute or regulation. Therefore, none of the criteria for review have been met.

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board. The appellant is hereby notified of his right to petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review the Board's decision within thirty (30) days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *July 23, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PATRICE SMITH
v.
DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE

Docket No.
NY075209027

OPINION AND ORDER

The initial decision of the presiding official found that appellant's reassignment from one GS-5 position to another did not constitute a reduction in grade or pay, or an action otherwise appealable to the Board. It further found that in the absence of an appealable action, the Board lacked the jurisdiction to entertain her allegation of racial discrimination. 5 U.S.C. 7702. The appeal was therefore dismissed as not within the Board's appellate jurisdiction.

The Board's regulations at 5 C.F.R. 1201.115 provide that the Board may grant a petition for review when it is established that:

(a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

The petition for review does not meet either of the above criteria. Accordingly, we find no basis for disagreement with the presiding official's initial decision and conclude that there is no basis on which to reopen the case.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of a final Board may be filed in the appropriate circuit of the U. S. Court of Appeals or in the U. S. Court of Claims no later than 30 days after receipt of the Board's final decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *July 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MICHAEL A. DANOWSKI
v.
UNITED STATES POSTAL SERVICE

Docket No.
PH075299085

OPINION AND ORDER

Appellant, a preference eligible, was removed from a position with the United States Postal Service during his 90-day probationary period. He appealed the removal to the Board's Philadelphia Field Office claiming that the removal was unfair and not warranted. The presiding official dismissed appellant's appeal on the ground that it was not within the appellate jurisdiction of the Board, citing 5 U.S.C. 7511.

The petition for review alleges the following:

> (1) that the initial decision by the presiding official was discriminatory and constituted a capricious and wanton disregard of the relevant facts in this matter, and
>
> (2) that the initial decision of the presiding official was based on an erroneous interpretation of the statute and regulations.

The petition for review contains no references to applicable laws or regulations as required by 5 C.F.R. 1201.115 (1979), and presents no other evidence in support of these allegations. In addition, the petition for review does not address the issue of the Board's appellate jurisdiction, the lack of which is the basis of the presiding official's decision.

The presiding official based his decision primarily on 5 U.S.C. 7511 which he stated set out the statutory rights of appeal for employees who have been removed from federal employment. He said that excluded from coverage of the statute by 5 U.S.C. 7511(a)(1)(B) were preference eligibles in the United States Postal Service who have not completed one year of current continuous service in the same or similar positions. The presiding official concluded that since the appellant had not completed one year of service at the time of his removal, that he did not have a statutory right of appeal to the Board.

The presiding official also considered whether appellant might have a right to appeal to the Board under Office of Personnel Management regulations. See 5 U.S.C. 1205(a)(1) and 5 C.F.R.

1201.3. (1979). The presiding official correctly concluded that appellant does not have a regulatory right of appeal to the Board.

Thus, the Board agrees with the conclusion of the presiding official that appellant has neither a regulatory or statutory right of appeal to the Board. In the absence of such a right, the Board is without appellate jurisdiction in this case.

Accordingly, the Board does not find that the initial decision was based on an erroneous interpretation of statute or regulation, and the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. The appellant is hereby notified of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *July 28, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ELIZABETH TILLERY
v.
DEPARTMENT OF DEFENSE

Docket No.
DC430C09001

OPINION AND ORDER

Appellant, Elizabeth Tillery, is a teacher with the Department of Defense, Dependents' Schools, in Bonn, West Germany. On November 7, 1979, she filed an appeal with the Washington, D.C. Field Office of the Merit Systems Protection Board from the agency's failure to change her official performance rating for the period from August 21, 1978, to June 14, 1979, from "Satisfactory" to "Outstanding." In an initial decision dated December 10, 1979, the presiding official found no statutory or regulatory basis for Board jurisdiction over the action appealed, because no right of appeal to the Board exists from either: (1) the interim adjectival rating of appellant's job performance under 5 U.S.C. Section 4302 (Supp. II 1978) and 5 C.F.R. Section 430.302(a) (1979); or (2) the agency's action on appellant's protest of her official rating under the agency's grievance procedures, according to 5 C.F.R. Section 771.118 (1979). The presiding official, therefore, dismissed the appeal.

Pursuant to 5 C.F.R. Section 1201.113(d) (1979), appellant requested and was granted a twenty day extension from January 21, 1980, to February 11, 1980, to file a formal petition setting forth the new material evidence that she alleged related to her case. No formal petition for review or other communication has been received by the Board in connection with this appeal.

The undated informal petition, received by the Board on January 8, 1980, alleges without elaboration that appellant has found new material evidence that relates to her case. The Board finds that the informal petition does not meet the criteria for a petition for review set forth in the Board's regulations at 5 C.F.R. Section 1201.115 (1979). Specifically, the Board finds no showing of new and material evidence which was not available when the decision of the presiding official was issued, and no showing that the decision of the presiding official was based on an erroneous interpretation of statute or regulation.

Accordingly, the petition for review is hereby DENIED.

This is the final decision of the Merit Systems Protection Board in this appeal. Appellant is hereby advised of her statutory right under 5 U.S.C. Section 7703 (Supp. II 1978) to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty calendar days of receipt of this decision by the Board.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *July 28, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DONALD W. ATWELL, ET AL. v. **DEPARTMENT OF THE ARMY**	Docket No. PH075299098

OPINION AND ORDER

Pursuant to 5 U.S.C. 7701(f)(1) and 5 C.F.R. 1201.36, the Board hereby consolidates for decision the case of Donald W. Atwell, et al., Frederick J. Baldwin, et al., Earl Bernard, et al., and William E. McCommons because each case presents the same issue for the Board's consideration. A complete list of the appellants who are directly affected by this decision is an addendum to this Opinion.

Each of the appellants was employed by the respondent agency at the Aberdeen Proving Ground, Maryland, in a position which was the subject of the application of a new classification standard, directed by the Office of Personnel Management (OPM), which accounted for the reclassification of their positions. Appellants were notified that, while they would otherwise have been subject to a change to lower grade because of the reclassification and the agency's inability to reassign them at their grade level, they were now entitled, by law, to retain their present grade for a two year period and their present salary levels indefinitely.

Through their union representative, appellants appealed to the Board's Philadelphia Field Office, protesting the propriety of the reclassification action. Decisions dated September 28, 1979, were issued by the presiding official, which dismissed the appeals as not within the jurisdiction of the Board. The presiding official found that 5 U.S.C. 5366 precludes appeals by employees from position reclassifications when grade and pay retention provisions are applicable.

Each appellant filed a petition for review of the initial decisions which asserted that 5 U.S.C. 5366(b)(1) does not preclude appeals in these cases because they are appealing the reduction in grade, under 5 U.S.C. 7512, not the classification action. They also contend that the actions taken against them are adverse actions because the grade retention benefits of the law are only temporary and partial; that there was no Congressional intent to take away the previously existing right of appeal from reductions in grade;

that 5 U.S.C. 7512, which sets forth appealable adverse actions, does not contain an exception for employees who receive grade and pay retention; and that the reclassification has resulted in their loss of a property interest in their jobs, which would entitle them to an appeal.[1] The agency was informed of the petitions for review and was furnished with copies for its response, but has submitted no representations in connection with the petitions.

However, OPM intervened in the case, contending that appellants' cases do not raise an appealable matter since they seek to appeal their continued assignment to a reclassified position. OPM maintains that appellants have not been subjected to an adverse action because they have suffered no loss of grade or pay within the meaning of 5 U.S.C. 7512; that reading 5 U.S.C. 5366(b) so as to provide a right of appeal to the Board would be redundant, since the classification of a position is appealable to OPM; and that it was reasonable for Congress to provide a right of appeal to the Board only to persons who were not eligible for grade retention.

Since the Board has not previously addressed the issues here presented, the petition for review is granted in order to examine the extent to which Section 5366 limits rights of appeal that would otherwise be available under Section 7512.

Under 5 U.S.C. 5362(b)(1), as amended by the Civil Service Reform Act of 1978, employees who would otherwise have been reduced in grade as a result of position reclassification are entitled to a two-year period of grade retention. In addition, an employee who ceases to be entitled to those benefits continues indefinitely to be entitled to pay retention benefits. 5 U.S.C. 5363(a).

With respect to appeal rights, 5 U.S.C. 5366(a) and (b) provide in pertinent part as follows:

> (2) Nothing in this subchapter shall be construed to affect the right of any employee to appeal—
>
> > (A) under section 5112(b) or 5346(c) of this title, or otherwise, any *reclassification of a position;* or
> >
> > (B) under procedures prescribed by the Office of Personnel Management, any *reduction-in-force action.*
>
> (b) For purposes of any appeal procedures (other than those described in subsection (a) of this section) or any grievance

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[1] Appellant McCommons initially petitioned the Board through the union and later withdrew his designation of that organization to act as his representative. The Board informed him that his petition would be adjudicated on the basis of the arguments submitted by the union unless he requested that this not be done or submitted other argument on his own behalf. No further communication from him has been received.

> procedure negotiated under the provisions of chapter 71 of this title—
>
> > (1) any *action which is the basis of an individual's entitlement to benefits under this subchapter*, and
> >
> > (2) any termination of any such benefits under this subchapter, shall not be treated as appealable under such appeals procedures or grievable under such grievance procedure. (Emphasis supplied)

Appellants contend that the non-appealable "action" to which subsection 5366(b)(1) refers is the reclassification of a position, but that the reduction in grade itself is the basis for an appeal under 5 U.S.C. 7512. The Board disagrees, based on both the plain wording of the statute (supra) and the legislative history of the relevant portions of the law.

With respect to the latter basis for decision, appellants take the position that reliance on the legislative history is misplaced because they believe that changes in the law as first proposed and as later passed render it obsolete. This contention is based on the fact that the grade and pay retention provisions which were eventually merged into the Civil Service Reform Act were, at first, considered in Congress as a separate bill, in which the grade retention period for reclassification actions first proposed was not time limited.

In examining this contention, we consider, first, the original bill, H.R. 9279. When it was reported out of Committee, the accompanying House Report, No. 95-994 (March 21, 1978), noted that the difference in proposed periods of grade retention between reduction-in-force downgrades (2 years) and reclassification actions (unlimited) was due only to the fact that reductions in force are taken to improve the economy and efficiency of Government, while reclassification actions correct administrative error (Report No. 95-994 at 5). It also noted that under the system then in effect, upon the reclassification of a position, an employee could file a classification appeal "not related to the employee's status in the position," and that after a reduction in force, an appeal could be filed which "is limited to determining whether the employee's agency correctly applied the reduction-in-force procedures" (*Id.* at 6). The Committee then stated:

> Subsection (b) of section 5367 provides that any action which is the basis of an individual's entitlement to benefits under subchapter VI or any termination of such benefits shall not be treated as an adverse action for purposes of any appeal procedures. This subsection is not intended to prohibit the filing of classification appeals (such as under part 511 of the Commission's regulations) or reduction-in-force appeals

> (part 351 of the Commission's regulations). Rather, subsection (b) is intended to prohibit the filing of adverse action appeals based on downgrading actions or termination of retained grade or pay benefits. (*Id.* at 15.)

When H.R. 9279 was later considered as part of the overall Civil Service Reform, the House committee stated:

> Subsection (b) of section 5362 provides that, with certain exceptions, the retained grade of the employee shall be treated as the grade of the employee's position for all purposes during the 2-year period. Committee on Post Office and Civil Service, Civil Service Reform Act of 1978, H. Rep. 95-1403, 95th Cong., 2d Sess. 63 (1978).

With specific reference to classification actions, the report states:

> Under subsection (a) of section 5363, an employee whose position has been reduced in grade is entitled to have the grade of the position, before the reduction, be treated as his retained grade so long as he continues to occupy such position. *The higher retained grade will be treated as the employee's grade for all purposes except for the application of reduction-in-force procedures.* (Emphasis added). *Id.* at 65

Finally, the Committee stated that:

> Subsection (b) of section 5367 provides that any action which is the basis of an individual's entitlement to benefits *shall not be treated as an appealable action for purposes of any appeal procedure* other than the appeal procedures described in paragraph (2) of subsection (a). Under subsection (b), the following actions would not be appealable (except as provided in paragraph (2) of subsection (a)):
>
> 1. Reduction of employee to lower grade as a result of reclassification of position;
>
> * * * *
>
> 6. Termination of retained grade because of expiration of 2-year period of entitlement under section 5362;
>
> * * * *
>
> 8. Receipt of only one-half of general pay increases under section 5364(a). (Emphasis added). *Id.* at 69.

On the basis of the above, the Board concludes that appellants' distinction between actions taken against the position and those against the employee does not provide a basis for finding that a right of appeal exists in connection with the instant actions. Clearly, Congress considered that the provisions of the grade and pay retention legislation would relate both to positions and employees, and appeals from actions affecting both were ruled out, except as specified in the act. Just as clearly, they intended to provide greater grade and pay retention protections to employees, in return for which no appeal was to be granted.

We do not find that the differences in the legislation as it was proposed when the Committee wrote its reports and as it appears now in the law have any effect on the clear statement of intent evident in the above quoted portions of the reports since most of the changes made were not relevant to the question of appealability. While, as stated above, appellants take issue with reliance upon this portion of the legislative history because the grade retention period for reclassification actions first proposed was not time limited, the 2-year limit was applicable to reduction-in-force actions, and Congress provided no special right of appeal (beyond that provided in section 5367(a)(2)) when the retention period began or ended.

Absent a clear indication on the part of Congress that the change in language of section 5362 was intended to provide employees with an adverse action appeal, of which we have found no evidence, the Board concludes that no such appeal right was intended by Congress.

Appellants next argue that they were deprived of a property right because of the reclassification. They also assert that establishing two classes of employees, one with appeal rights to the Board and one without, is constitutionally impermissible without a rational basis for the classifications. We find, however, that the grade and pay retention provisions of the law clearly provide a substantial benefit to those employees to whom they are applied which does not inure to employees who are not eligible for grade and pay retention. We conclude, therefore, that the statute's creation of two groups of employees with distinct rights is an appropriate, rational classification, in light of this difference.

Finally, we note appellant's assertion that regulations issued by the Office of Personnel Management pursuant to its authority under 5 U.S.C. 5365, specifically 5 C.F.R. 752.401(c), provide a right of appeal from reductions in pay and reductions in grade such as those they contend they have suffered. This contention is clearly in error. The cited section of the regulations specifically excludes from the coverage of that subpart "Action under part 536 resulting from downgrading decision which entitles employee to retained grade for 2 years." See 5 C.F.R. 210.101(d)(106).

Accordingly, having reconsidered the case, the Board concludes that employees who continue to be assigned to positions which are reclassified downward, and who receive the benefits of 5 U.S.C. 5362 and 5363, may not appeal to the Merit Systems Protection

Board from either the reclassification of the position or the reduction in grade and/or pay which, but for the grade and pay retention provisions of the Civil Service Reform Act, might otherwise have been appealable. Employees under such circumstances may still vindicate their statutorily granted rights through a classification appeal directed to OPM. Hence, we conclude that the decisions of the presiding official did not involve an erroneous interpretation of law or regulation and it is hereby Ordered that those decisions be Affirmed.

This is a final decision of the Merit Systems Protection Board.

Appellants are hereby advised of their right to seek judicial review of the Board's final decision by filing a civil action in an appropriate circuit of the U.S. Court of Appeals or in the Court of Claims within 30 days of receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *July 25, 1980*

ADDENDUM

The appellants in the case of Donald W. Atwell, et al. are as follows:

Donald W. Atwell
Frederick J. Baldwin
Earl Bernard
Paul E. Booth
Lamar J. Carter
John B. Chester
Daniel W. Deal, Jr.
Charles H. Feveryear
Harold J. Foster
Lee R. Gorham
William C. Gorham
William H. Hociak
Ronald H. Knight
Lewis McCannon
William E. McCommons
Delaney R. Moxley
Robert J. Parker
Lewis E. Preston
Marvin M. Rembold
Ricárdo Rosas
Charles M. Simmons
Jack R. Smith
Gerald F. Thomas
Charles R. Williams
William F. Wilson

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HILDA B. SCHULZ
v.
VETERANS ADMINISTRATION

Docket No.
DC315H09006

OPINION AND ORDER

The initial decision of the presiding official dismissed, for lack of jurisdiction, petitioner's appeal which alleged that her separation during the probationary period of her competitive service appointment, taken for reasons arising after her appointment, was based on race discrimination.

As stated by the presiding official in the initial decision, probationary employees are specifically excluded from those classes of persons entitled to appeal removal actions to the Board. 5 U.S.C. 7511(a)(2)(A). Thus, as a probationary employee, petitioner has no statutory right of appeal to the Board.

Moreover, under section 3 of Reorganization Plan No. 1 of 1978, 43 F.R. 19807 (May 9, 1978), Exec. Order No. 12106, 44 F.R. 1053 (January 3, 1979), the equal opportunity functions in federal employment previously vested in the Civil Service Commission have been transferred to the Equal Employment Opportunity Commission (EEOC). Hence, as the presiding official properly decided, the Board lacks jurisdiction over the race discrimination issue raised by petitioner. Therefore the petition fails to meet the criteria for review under 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *July 28, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD T. HOLLAND
v.
DEPARTMENT OF THE TREASURY

Docket No.
AT315H09010

OPINION AND ORDER

The appellant, by his legal aid society representative, filed a petition for appeal with the Board's Atlanta Field Office on August 8, 1979, alleging that his resignation on July 17, 1979, as a Tax Examiner, GS-592-03, with the Department of the Treasury, Internal Revenue Service, was involuntary. The appellant was a probationary intermittent employee hired by the agency on January 16, 1978, and worked for 97 days before his separation. The appellant's petition alleged that on July 17, 1979, his supervisors demanded his "immediate resignation under threat of disclosure of false charges against him." The appellant asserted that his resignation, effective the date it was rendered, was the product of agency coercion and, thus, was involuntary.

The presiding official, by initial decision dated October 24, 1979, found that the appellant was a probationary employee and as such he was excluded under 5 U.S.C. Section 7511(a)(1)(A) (Supp. II 1978) from the statutory rights of appeal afforded to federal employees by the Civil Service Reform Act of 1978. The presiding official noted that the Office of Personnel Management (OPM), by authority pursuant to 5 U.S.C. Section 1205(a)(1) (Supp. II 1978), has provided probationers with certain regulatory appeal rights to the Board. *See* 5 C.F.R Part 315, Subpart H (1979). He found that the appellant's petition for appeal, however, did not allege and the record did not reflect that his termination was based on partisan political reasons or marital status, or prohibited discrimination or physical handicap as set forth in 5 C.F.R. Section 315.806(b) and (d) (1979), 44 Fed. Reg. 48951-52 (1979), effective August 21, 1979. Nor did the appellant allege that his termination was in violation of procedural requirements established by OPM in 5 C.F.R. Section 315.805 (1979). Thus, the presiding official dismissed the petition for appeal as not within the jurisdiction of the Board.

The appellant *pro se* by letter dated November 27, 1979, filed a petition for review with the Board in which he stated that he would file "additional information, within the next 7-10 days." The Board has not since received any additional submissions from the appellant. The agency has chosen not to file a responsive pleading to the appellant's petition.

The appellant's petition for review does not set forth any objections to the initial decision, nor is it supported by references to applicable laws or regulations, and with specific reference to the record. 5 C.F.R. Section 1201.115 (1979). Nor does it establish that new and material evidence is available that, despite due diligence, was not available when the record was closed, or that the decision of the presiding official is based on an erroneous interpretation of statute or regulation. *Id.*

Accordingly, the petition for review of the initial decision of the presiding official is DENIED for failure to meet the regulatory criteria for review.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *July 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ESTHER M. MARKS
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DA752090025

OPINION AND ORDER

Appellant, an Accounting Technician at Barksdale Air Force Base, Louisiana, separately filed two appeals with the Board: one involving a one-day suspension, and the other involving placement in AWOL status during the period August 27-31, 1979.

By initial decisions dated August 8, 1979 and November 8, 1979, respectively, those appeals were dismissed for lack of jurisdiction by the Board's Dallas Field Office. By petition dated September 28, 1979, appellant requested that we review the dismissal of her appeal from the one-day suspension; by petition dated December 12, 1979, and supplemented May 6, 1980, she requested review of the dismissal of her appeal from the placement in AWOL status. The agency responded on February 8, 1980 to the December petition, stating that no unwarranted adverse actions had been taken against appellant.

We note that both of the personnel actions appealed from arose from the circumstances of May 11, 1979, at which time appellant was issued a letter involving her allegedly excessive use of leave, which she initially refused to accept and read. The Board hereby joins appellant's two appeals for consideration. We find that this joinder will expedite the processing of the two cases, and will not adversely affect the interest of any party. See 5 U.S.C. 7701 (f) (2) and 5 C.F.R. 1201.36 (a) (2).

The presiding officials found that while 5 U.S.C. sections 7512 and 7513 provide a statutory right of appeal from the adverse actions of removal, suspension for more than 14 days, reduction in grade, reduction in pay, and furlough of thirty days or less, neither the statute nor the implementing federal regulations provide that an employee may appeal to the Board from a one-day suspension, or from the placement in an AWOL status during a period of employment.

Appellant's petitions fail to identify to us any error in the presiding officials' analyses of pertinent law on the issue of jurisdiction, and we find that no such error has occurred. We hold that the dismissal of appellant's respective appeals for lack of jurisdiction was thus proper in each instance.

Accordingly, the petitions for review are DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of her right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *July 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANCIS E. ANDERSON v. UNITED STATES DEPARTMENT OF AGRICULTURE	Docket No. DC075299002

OPINION AND ORDER

Petitioner was terminated during the trial period of her appointment as an excepted service employee with the Forest Service, U.S. Department of Agriculture. She appealed to the Washington, D.C. Field Office of the Board, alleging race and sex discrimination.

On appeal, the presiding official found that, because of petitioner's status as an excepted service employee terminated during a trial period, the Board lacked jurisdiction over the appeal.

Petitioner seeks review of the initial decision on the ground that the presiding official erred in declining to consider the merits of her case. Therefore, the petition is based on 5 C.F.R. section 1201.115(b), which provides that the Board may grant a petition for review where it is established that the decision of the presiding official is based on an erroneous interpretation of statute or regulation.

An excepted service employee who is not a preference eligible has no statutory right of appeal to the Board. Pursuant to 5 U.S.C. Section 7511(a) the right to such appeal is limited to certain competitive service and preference eligible employees. Since petitioner is neither in the competitive service nor a preference eligible employee, she has no such right of appeal.

A regulatory right of appeal to the Board is conferred by 5 C.F.R. section 315.806 upon a probationary employee in the competitive service. Because petitioner is an excepted service employee, that regulatory right of appeal does not extend to her. Hence, the Board lacks jurisdiction to entertain the appeal, as the presiding official properly determined. Therefore the petition does not meet the criteria for review set forth in 5 C.F.R. section 1201.115(b).

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the

appropriate United States Court of Appeals or the United States Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *July 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BRIAN K. HURST
v.
GENERAL SERVICES ADMINISTRATION

Docket No.
PH315H99021

OPINION AND ORDER

Appellant was terminated effective April 20, 1979, during his probationary period, from his position of Custodial Laborer. He appealed, claiming that he had not received a fair hearing, that witnesses had contradicted themselves, that the supervisor had not found out all the facts, and that he had been discriminated against by reason of his sex.

The presiding official of the Board's Philadelphia Field Office, in his initial decision of May 30, 1979, concluded that the Board was without jurisdiction to entertain an appeal from an employee terminated during his probationary period of employment for post-appointment reasons where notice of the termination is received by the employee on or after January 1, 1979, and where the basis for the appeal is alleged discrimination because of sex and/or because the action is alleged to be unwarranted. The presiding official thus dismissed the appeal.

On June 29, 1979 the Board received appellant's petition requesting review of the initial decision. By his petition appellant has raised no disagreement with the initial decision as it stands; rather, he has alleged an additional basis for the agency's action, *i.e.*, his marital status (single). Appellant stated in his petition that he thought that he had included that allegation when he had alleged a sex discrimination basis for the agency's action.

5 U.S.C. 7701(e)(1) provides, in pertinent part, that the initial decision of the presiding official shall be final unless a petition for review is timely filed by one of the parties. The criteria for the Board's review of an initial decision, which were in effect at the time of the instant appeal, are contained in section 1201.113 of the Board's interim procedures, published at 44 F.R. 3952 (January 19, 1979). We find that appellant's allegation that the action had been based upon his marital status, raised for the first time in his petition for review, affords an insufficient basis on which to grant the petition, in view of those criteria.

Had appellant alleged some facts which should have placed the presiding official on notice that a claim was being made or implied that the agency's action had been based upon appellant's marital status, the Board would now be presented with a basis for reviewing the presiding official's dismissal of the appeal. However, such was not the case. The petition for appeal listed five reasons for the appeal, none of which refer to marital status. Reason number five, in its entirety, was "Sexual discrimination." Based upon the allegations which were made and upon the record before him, therefore, the presiding official could not reasonably have known that appellant was attempting to allege that the action had been based upon his marital status. The dismissal of the appeal for lack of appellate jurisdiction was thus proper. *See* 5 C.F.R. 315.806(b), which was impacted by Reorganization Plan No. 1 of 1978, 44 F.R. 1053 (January 3, 1979), and subsequently amended, 44 F.R. 48951 (August 21, 1979).

Additionally, we decline to hold that allegations of sex discrimination and marital status discrimination are so similar that they may be made interchangeably. Where the question is one of jurisdiction, special importance attaches to the precise nature of the allegations comprising the appeal.

Finally, we conclude that the allegation of marital status discrimination does not amount to a showing of new and material evidence, upon which the petition may be granted. See Section 1201.113(a) of the interim regulations.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *July 29, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JIM J. YOURAINE
v.
U.S. DEPARTMENT OF NAVY

Docket No.
AT075299038

OPINION AND ORDER

Appellant, an employee of the Department of Navy, was removed, effective April 6, 1979, from the position of Supervisory Supply Technician, GS-8, at the Marine Air Corps Station, Cherry Point, North Carolina. The removal action was based on the charge that appellant, while serving as the Manager of the Quick Draw Supply Outlet at the Air Station, wrongfully removed certain government property from the Outlet and that he wrongfully withheld the same property at his home. The presiding official sustained the removal action and found the charge to be supported by a preponderance of the evidence.

The appellant filed the instant petition for review in which he raised two issues on appeal. First, he contends that certain physical evidence used to support the charge of theft of government property was acquired through an unconstitutional search and seizure. Specifically, appellant contends that a consent search of appellant's residence performed by investigative agents of the agency, which resulted in the seizure of a quantity of goods and materials suspected as being government property, was unconstitutional inasmuch as the agents had no probable cause to request a consent search. The appellant's contention in this regard is without merit. While it is true that in general a search conducted without a warrant or probable cause is improper, *see, e.g., Katz* v. *United States*, 389 U.S. 347 (1967), one of the well-recognized exceptions to the rule is where the defendant consents to the search. See *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973).

Here the appellant consented to the search. After the agency advised appellant of his rights concerning search and seizure, appellant executed an authorization permitting Naval Investigative Services special agents to search his personal effects, automobiles and home and seize and property found during the search which was desired for investigative purposes. The authorization executed by appellant stated, in part:

> . . . I have been informed of my constitutional right to refuse to permit this search in the absence of a search warrant. In full understanding of this right, I have nevertheless decided to permit this search to be made. This search may be conducted on January 26, 1978 by Special Agent(s) D. W. Ramsey [and] A. S. Carballo and I hereby give him/them my permission to remove and retain any property or papers found during the search which are desired for investigative purposes. I make this decision freely and voluntarily and it is made with no threats having been made or promises extended to me.

Inasmuch as appellant voluntarily consented to the agency investigative agent's search of his residence, the need for probable cause was obviated.[1] *Cf. United States* v. *Taibe*, 446 F. Supp. 1142 (E.D.N.Y. 1978). *See generally Davis* v. *United States*, 328 U.S. 582 (1946); *Jackson* v. *Hampton*, 535 F.2d 1250 (4th Cir. 1976).

Furthermore, it appears from the record that appellant, who was represented by legal counsel, did not object at the hearing to the admission into evidence of the seized goods and materials. Although the record indicates that, subsequent to the issuance of the presiding official's decision, counsel for appellant requested the presiding official to acknowledge for the purposes of the record appellant's alleged objection at the hearing to the admission of the articles, the record also reflects that the presiding official advised counsel that he did not recall the making of such objection by appellant. Accordingly, the presiding official declined to note such an objection in the record.

Appellant also contends in his petition for review that the charge of theft of government property is not supported by the necessary preponderance of the evidence. A review of the record reflects otherwise. First, the seized items were identical to items sold in the Quick Draw Supply Outlet. Second, identifying labels had been removed from some seized items without explanation; the prior positions of these labels were identical to the positions of labeled items in the store. Third, the government property identifying tag affixed to a seized calculator had been concealed with tape. Fourth, appellant did not have the permission of the agency to borrow this property. Finally, it was unrefuted that prior to the hearing the appellant had admitted that some of the items found in his house had come from his office at the Air Station.

The Merit Systems Protection Board may grant a petition for review which meets the criteria set forth at 5 C.F.R. § 1201.115.

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[1] Appellant did not allege that his consent to the search was obtained by duress or coercion.

The Board finds that the petition does not meet the regulatory criteria.

Accordingly, the Petition for Review is DENIED. This is the final decision of the Merit Systems Protection Board on this case.

Appellant is advised that he may seek judicial review of the Board's final decision by filing a civil action in an appropriate circuit of the U.S. Court of Appeals or the Court of Claims within 30 days of receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *July 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARION J. COLEMAN
v.
DEPARTMENT OF THE ARMY

Docket No.
AT075299059

OPINION AND ORDER

Appellant, a Food Service Worker Leader, WL-2, with the U.S. Army Medical Department Activity, Martin Army Hospital, Fort Benning, Georgia, was notified on March 23, 1979, that his removal was proposed because of repeated absences without leave (AWOL). Specifically, the agency charged the appellant with being AWOL on October 14, 15, 16, 18, 19, and 20, 1978; and February 17 (6 hours), 18, 20, 21, 22, and 23, 1979. Appellant filed an appeal with the Board's Atlanta Field Office alleging that his attendance problems were attributable to his alcoholism and that the agency should have afforded him an opportunity for rehabilitation. The presiding official found that the preponderance of the evidence supported the charges of AWOL and showed the agency had assisted appellant in his rehabilitation efforts by enrolling him in a 90-day rehabilitation program in 1978. Therefore, he affirmed the action.

The petition for review does not present any new evidence or allege any erroneous interpretations of applicable statutes or regulations. Therefore, the criteria for review of 5 C.F.R. 1201.115 (1979) have not been met.

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision by appellant.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *July 30, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES CUNNINGHAM
v.
DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Docket No.
DC075209004

OPINION AND ORDER

On or about September 7, 1979, appellant appealed to the Board's Washington, D.C. Field Office from the agency actions of placing him under daily supervision and requiring him to follow special leave procedures.

In the initial decision of October 17, 1979, the presiding official dismissed appellant's appeal of the said agency actions for failing to come within the Merit Systems Protection Board's (hereinafter the "Board") appellate jurisdiction.

As the basis for appellant's petition for review, he asserted as new and material evidence that these agency actions were the result of reprisals for his having reported a violation of the "Freedom of Information Privacy Act of 1974" (sic) and for his filing a discrimination complaint. Appellant also argued that the initial decision was in violation of the Freedom of Information and Privacy Acts of 1974.

Upon careful consideration of appellant's contentions in his petition for review, the Board finds no basis for review of the presiding official's initial decision. Adverse actions appealable to the Board do not include the agency actions of subjecting an employee to daily supervision and special leave procedures. *See* 5 U.S.C. 7512. Therefore, appellant's appeal does not fall within the Board's jurisdiction.

In reaching this decision, the Board finds that appellant's contentions of reprisal were raised with the presiding official and thus can not be considered new evidence. Moreover, issues of reprisal are adjudicable by the Board only where such issues are alleged as the basis for adverse actions which are appealable to the Board. Since appellant's claim of reprisal is not related to an appealable adverse action, the Board will not review the reprisal issue standing alone.

Finally, because appellant did not establish that the presiding official misinterpreted applicable law in reaching her decision,[1] the Board concludes that the petition fails to meet the criteria for review as set forth in 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *July 30, 1980*

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[1] The Board notes that although appellant argued that the initial decision was also violative of the Freedom of Information and Privacy Acts of 1974, he did not state why or how this was true. Further, he has cited no law or regulation which would vest authority in the Board to hear his appeal.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

In the matter of:
JOHN W. KING
ADMINISTRATIVE LAW JUDGE — Docket No. 11
OFFICE OF HEARINGS AND APPEALS
SOCIAL SECURITY ADMINISTRATION

FINAL DECISION AND ORDER OF THE BOARD

The Board has before it the parties' joint motion to dismiss the agency's action of January 29, 1979, seeking the involuntary retirement of respondent administrative law judge.[1] The motion to dismiss is based on a settlement agreement negotiated by the parties. Also before the Board is a decision of June 20, 1980, by Administrative Law Judge John J. McCarthy, before whom the case had been set for hearing, recommending that the Board approve the settlement agreement and grant the motion to dismiss.

The Board has fully reviewed the record in this proceeding, has examined the terms of the settlement agreement, and has considered Judge McCarthy's recommendation. In its independent judgment, the Board believes that the overall public interest would be served by approval of the agreement and grant of the motion to dismiss.

Efforts to remove Judge King have been underway since June of 1976 (Docket No. 5). The proceeding begun at that time was dismissed in March of 1979,[2] upon approval of a settlement agreement under which respondent agreed to undergo a medical examination. The examination took place during a two-week period of hospitalization in November of 1978. The psychiatrist's report of the results of that examination formed the sole basis for the agency's current action to secure respondent's involuntary retirement.

The agency alleges that respondent is "totally disabled for useful, efficient service in his position of administrative law judge and his disability is not due to vicious habits, intemperance, or willful misconduct."[3] Respondent, through counsel, has vigorously opposed the agency's efforts to place him on involuntary retirement. Among numerous other arguments, respondent contends that the agreement under which the prior proceeding was dismissed did not include the agency's use of the results of the November 1978 psychiatric examination in the current proceeding.

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[1] An involuntary change in the status of an ALJ is a "removal" under OPM regulations at 5 C.F.R. § 930.202(f). Therefore, the agency's current involuntary retirement action is a removal action brought pursuant to 5 U.S.C. § 7521, which requires that good cause for removal be established by the Board after opportunity for hearing.

[2] *See* Board's Order of March 9, 1979, dismissing the complaint in Docket No. 5, pursuant to a Joint Motion to Dismiss.

A day before hearing was to begin in April of 1980, Judge McCarthy was advised by the agency of a tentative agreement with respondent. That agreement was presented as a stipulation of settlement and motion to dismiss on June 9, 1980.

The terms of the agreement are, in effect, that respondent will voluntarily retire in April of 1981 and in return the agency will, until that time, pay him his salary as an administrative law judge and will pay his accrued annual leave in a lump sum when he retires. During the period until April 1981, respondent will have his home as his duty station and will be on sick leave after January 1, 1981.[4]

In their Stipulation of Settlement, the parties agree that the purpose of settlement is to protect the interests of the parties by saving each the considerable expense of a hearing before the Board and possibly further litigation in the courts, and to save the Board the expense and time of conducting a hearing. Public policy strongly favors settlement of disputes without litigation and the courts uphold settlement agreements whenever equity and public policy permit.

> By such agreements are the burdens of trial spared to the parties, to other litigants waiting their turn before overburdened courts, and to the citizens whose taxes support the latter. An amicable compromise provides the more speedy and reasonable remedy for dispute.[5]

Similarly, when parties seek Board approval of a settlement agreement, the Board must look to the complexity, expense, and likely duration of litigation, as well as the equity of the settlement as to each party. The time and expense incurred by both parties during the past four years, and the substantial likelihood of further and prolonged litigation to resolve the question of respondent's disability is a factor favoring settlement. The parties have been represented by counsel and each is satisfied with the terms of the settlement. The Board has found no law, rule, or regulation that forbids the agency's agreeing to settlement on the stipulated terms.

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[3] The agency relies on a psychiatrist's report stating that he and his colleagues who examined respondent concluded that he was totally disabled to serve as an administrative law judge because he had organic brain disease affecting his abstract reasoning, planning and organizing skills, and short term memory, and had developed paranoid delusions.

[4] If respondent fails to file voluntarily for retirement, the agency reserves the right to file a new complaint with the Board seeking involuntary retirement based on the medical findings that constituted the basis of the current complaint. Respondent agrees that he will file no defense, either legal or factual, to such an action.

[5] *Aro Corp.* v. *Allied Witam Co.*, 531 F.2d 1368, 1372 (1976). *See also D. H. Overmeyer Co.* v. *Loflin*, 440 F.2d 1213 (5th Cir. 1971).

Under all the circumstances of record, therefore, the Board finds the settlement in the public interest, approves it, and grants the motion to dismiss.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 6, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

In the matter of:
RICHARD C. CURTIS
AND
RAILROAD RETIREMENT BOARD
CHICAGO, ILLINOIS 60611
AND
E. E. KOCH
CHIEF EXECUTIVE OFFICER
RAILROAD RETIREMENT BOARD
CHICAGO, ILLINOIS 60611

Docket No.
HQ120800022ab

OPINION AND ORDER

On July 18, 1980, the Acting Special Counsel filed a Petition for Stay under 5 U.S.C. § 1208(a) of the involuntary reassignment of Richard C. Curtis, a Contact Representative at the Railroad Retirement Board. The Acting Special Counsel alleged that, while the agency's stated reason for Mr. Curtis' reassignment was "because of interpersonal conflicts and resulting tensions which interfere with productivity" (Petition for Stay of Personnel Action (P.S.) filed July 18, 1980, Attachment X), the stated reason was a pretext. The Acting Special Counsel alleged that the agency's true motivation in reassigning Mr. Curtis was retaliation for Curtis' filing of grievances with the agency pursuant to its negotiated grievance procedure.

The Acting Special Counsel accompanied her petition with substantial documentary evidence. This evidence was susceptible of conflicting interpretations,[1] but it did establish a time sequence from which a retaliatory motive could be inferred. Therefore, the Chairwoman found it not inappropriate to grant a fifteen-day stay by Order dated July 23, 1980.

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[1] Evidence which tended to support the agency's stated reason for reassignment included the following: (1) a petition signed by nine of Curtis' fellow employees complaining about his behavior in the office (P.S. Attachment Y); (2) the affidavit of Harry Paul, District Manager of the Philadelphia District Office of the Railroad Retirement Board, stating that Curtis is unmanageable, that "he has been observed with his ear to a door apparently listening in on conversations," and that he stares at the other employees and wanders around the Office (P.S. Attachment FF); (3) the affidavit of Audrey Wiley, former receptionist with the Philadelphia Office, stating that Curtis stands outside the main door, "not talking to anybody, but just watching" (P.S. Attachment HH); (4) the affidavit of Wanda Hylwiak, a clerk typist in the Office, stating that Curtis picks up the phone and listens in on the conversations of the others and further that Curtis "keeps notes on all of us in the Office"

On August 4, 1980, the Acting Special Counsel filed an Addendum to Request for 5 U.S.C. § 1208(b) Stay. The Addendum asserts that the Acting Special Counsel has conducted "a detailed on-site investigation," and has taken twelve affidavits, nine[2] of which are signed and are in her possession. However, the Acting Special Counsel has submitted no documentary support whatsoever for her request for a stay under § 1208(b).

In *In the Matter of Mildred G. Kass, et al.*, 2 MSPB 251, 265 (1980), the Board discussed what it required of a petition for stay under 5 U.S.C. § 1208(b):

> Since the legislative history demonstrates that the purpose of the initial stay is to provide interim relief while the investigation of the Special Counsel proceeds, it is not unreasonable to assume that the Board member may well want to know why the additional 30-day extension of the investigatory time is needed.

Elsewhere in *In the Matter of Mildred G. Kass, et al.*, the Board stated that "conclusory allegations cannot suffice." *Id.*, 263.

The Acting Special Counsel has presented the Board with conclusory allegations that, based upon her on-going investigation, she continues to have reasonable grounds to believe that Mr. Curtis' reassignment was a prohibited personnel practice under 5 U.S.C. § 2302(b)(9). She has alleged that she possesses evidence which she has not made available to the Board. The questions raised by her July 18th Petition regarding the conflicting interpretations of the evidence are even more troubling in light of her failure to submit additional documentation.

On August 4, 1980, the agency filed a Petition opposing the Acting Special Counsel's request, alleging that it had submitted to the Office of Special Counsel corrected versions of the unsigned affidavits previously filed in support of Acting Special Counsel's July 18th Petition, as well as additional affidavits not previously filed with the Board. Because the Acting Special Counsel did not submit this additional information with her Addendum, the

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(P.S. Attachment II); (5) the affidavit of Robert Ralston, a fellow Contact Representative, stating that Curtis "walks around and listens to other employees' conversations" (P.S. Attachment KK). These documents have been noted not because they establish that Mr. Curtis conducted himself inappropriately, but rather because they show the interpersonal tensions that exist in the Philadelphia Office.

[2] It is not clear whether the six unsigned affidavits and one signed affidavit submitted with Special Counsel's July 18th petition are to be included in this count.

agency offered the supplementary affidavits in support of its opposition. The substance of the affidavits submitted by the agency consists mainly of complaints by Curtis' fellow employees about his conduct in the office.

While a stay under 5 U.S.C. § 1208(b) may be issued *ex parte*, where the agency has filed a submission in opposition to the stay, the Board has the discretion to review the agency's submission. *In the Matter of Robert J. Frazier, et al.*, 1 MSPB 2, 3 (1979).

Since the Acting Special Counsel has failed to present the Board with more than conclusory allegations that she has reasonable grounds to believe that the reassignment involved here was a prohibited personnel practice under 5 U.S.C. § 2302(b)(9), the Board has exercised its discretion to examine the submissions of the agency, and has considered them in reaching its determination. While it is not clear whether the seven affidavits submitted by the agency represent the sum total of all of the outstanding affidavits, if these affidavits are representative of the evidence withheld by the Acting Special Counsel, it would appear that the evidence withheld tended to be damaging to her case.

In light of these circumstances, a stay under 5 U.S.C. § 1208(b) would be inappropriate. Accordingly, the Acting Special Counsel's Petition for Stay under 5 U.S.C. § 1208(b) is DENIED.

RUTH T. PROKOP,
Chairwoman.

August 7, 1980

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

STEVEN D. POWELL v. UNITED STATES DEPARTMENT OF INTERIOR	Docket No. PH075209003

OPINION AND ORDER

By petition dated November 6, 1979, the United States Department of Interior (hereinafter referred to as "the agency") seeks review of the initial decision of the presiding official reversing its decision to remove respondent.

FACTUAL BACKGROUND

By memorandum dated April 17, 1979, the agency charged respondent, a motion picture projectionist with the National Park Service, Philadelphia, Pennsylvania, with abuses of leave occurring on February 1, 4, 5, and 14, 1979, and on March 18 and 19, 1979, and with failure to adhere to previous leave restrictions placed upon him. The memorandum proposed respondent's removal but reflected a willingness to retain him in the employ of the Park Service should his attendance improve to the satisfaction of the agency.

Convinced that respondent's attendance had not improved to its satisfaction, the agency issued its decision to remove dated June 20, 1979. The decision referred to the proposed removal and the terms thereunder which the agency would have considered in retaining respondent in its employ. It further alluded to abuses of leave occurring subsequent to April 17, 1979, i.e., April 26, and 30, 1979, May 10, 1979, and June 11, 1979. The decision also alluded to an incident of June 13, 1979, in which respondent allegedly threatened the life of a supervisor. It was solely with respect to these latter charges that petitioner introduced evidence at the hearing.

On appeal to the Philadelphia Field Office of the Board, respondent alleged discrimination based on race, religion, and physical handicap. At the hearing, respondent submitted no evidence to support his allegations of discrimination based upon race and religion, and the presiding official found in his decision dated October 4, 1979, that there was insufficient evidence to sustain the allegation of discrimination based upon physical handicap. Hence, he found that the agency's action had not been affected by discrimination.

As to petitioner's decision to remove, the presiding official determined that the content of the advance notice upon which the agency relied was not "evidence" and that, therefore, the agency's decision was not supported by a preponderance of the evidence as required by 5 U.S.C. 7701(c)(1)(B) and 5 C.F.R. 1201.56 (a)(ii).

This petition for review was filed pursuant to 5 C.F.R. 1201.115 (a) and is based upon the submission of documents, namely, respondent's time and attendance records and letters of warning and counseling which, the agency contended, constituted new and material evidence. Respondent, on the other hand, argued that: (1) the evidence now relied upon by the agency was available to it at the time of hearing; (2) because the agency did not produce the evidence at the hearing, respondent was not afforded an opportunity to rebut it and should not be denied an opportunity to cross-examine witnesses against him; and (3) the decision of the presiding official is in accordance with 5 U.S.C. 7701.

ISSUE

The issue presented is whether documents which were in the possession of the agency at the time of hearing but were not produced because, in the agency's judgment, their submission was deemed unnecessary can properly be relied upon in a petition for review pursuant to 5 C.F.R. 1201.115(a).

DISCUSSION

Under 5 C.F.R. 1201.115(a), a petition for review may be granted by the Board where it is established that: "New and material evidence is available that, despite due diligence was not available when the record was closed."

First, as to the question of materiality, we find that the documents upon which petitioner now relies, i.e., respondent's time and attendance records and letters of warning and counselling, do constitute material evidence in that they were directly relevant to and probative of the charges contained in the advance notice, and were "of a material and controlling character such as would change the substantial equities between the parties." *Coltman* v. *Colgate-Palmolive-Peet Co.,* 127 F.2d 518, 519 (7th Cir. 1942).

That finding notwithstanding, however, we must consider whether the proffered evidence is otherwise acceptable under 5 C.F.R. 1201.115(a).

The documents concerned were prepared and retained by the agency as part of its records kept in the normal course of its operations. At no time has the agency alleged that it lost custody or control of the records at any time before or during the hearing. In fact, the agency's only reason, as stated in its petition for review, for failure to offer the documents into evidence at the hearing was the belief that the introduction of the documents was "unnecessary" and that "written certification by an authorized agency official as to the appellant's infractions was sufficient to establish that appellant was absent without authorization on the dates cited in the April 17, 1979 proposal to remove notice."[1]

Thus, it is clear that, at all times herein pertinent, the agency had knowledge of the documents and that those documents were available to the agency. Consequently, such documents can not now qualify as a basis for review under 5 C.F.R. 1201.115(a).

The agency's confusion in distinguishing between that which constituted "allegations", as contained in the notice of proposed removal, and that which constituted "evidence" required to support those allegations resulted in the agency's failure to prove by a preponderance of the evidence, as required by 5 U.S.C. 7701 (c)(1)(B) and 5 C.F.R. 1201.56(a)(ii), the charges contained in the advance notice. In lieu of proving those charges by testimony and/or by introduction of its records, the agency introduced evidence of other instances of respondent's absenteeism and misconduct with which respondent had not been charged. Hence, respondent was, in effect, deprived of due notice of those additional charges against him in violation of 5 C.F.R. 752.404(b) and of the opportunity to respond thereto as provided by 5 C.F.R. 752.403(c). The advance notice may here be analogized to an indictment insofar as the purpose of both documents is to apprise the accused party of the charges being brought against him, and the courts have held that an indictment does not constitute evidence of the charges contained therein. *Taylor* v. *Kentucky*, 436 U.S. 478, 98 S.Ct. 1930, 56 L.Ed 2d (1978).

The fact that respondent failed to deny the charges in the advance notice and in the notice of decision is inconsequential. The appellant has no burden to disprove the charges against him. Rather the agency is obligated to submit a well-developed record to the presiding official in order to prove its case by a preponderance of the evidence in accordance with 5 U.S.C. 7701(c)(1)(B), as the presiding official properly concluded.

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[1] That tactical error would not, in all probability, have occurred had the agency availed itself of legal representation.

CONCLUSION

Consequently, we find that the documents relied upon by the agency to support its petition for review were available to the agency before and during the hearing, and that the agency had knowledge of the existence of the documents. Further, the agency had ample opportunity to introduce all of its evidence and documents during the appeal stage of this proceeding, but failed, through its own lack of due diligence, to realize their materiality. To permit the agency to correct its judgmental error after the fact would result in a state of infinite litigation. We therefore hold that the agency's failure to more fully document the record cannot be corrected through this petition, which fails to meet the criteria for review.

Accordingly, the petition for review is DENIED. The agency must direct evidence of compliance with the decision of the Philadelphia Field Office to the presiding official in accordance with the instructions in the initial decision.

This is the final decision of the Merit Systems Protection Board in this case. Respondent has the right to petition the Equal Employment Opportunity Commission to consider the charges of discrimination which he raised on appeal but which were not sustained. Respondent also has the right to file a civil action under the antidiscrimination laws in any appropriate United States district court. Either a petition to EEOC or a civil action in a United States district court must be filed no later than thirty (30) days after the respondent's receipt of this decision. Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 7, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DONALD E. HARVEY
v.
VETERANS ADMINISTRATION

Docket No.
AT075209026

OPINION AND ORDER

The appellant by petition for appeal prepared *pro se*, dated August 11, 1979, and filed August 17, 1979, requested the Board's Atlanta Field Office to review his alleged forced resignation effective July 24, 1979, from his position as Claims Clerk/Typing, GS-998-5, with the Veterans Administration, Asheville, North Carolina.

The agency had proposed the appellant's removal on June 25, 1979, based on charges that he obtained and filled at least four drug prescriptions on which the physician's signature had been forged and that during the agency's subsequent investigation he allegedly falsely attested that he did not receive the medications. On July 3, 1979, the appellant submitted his resignation effective July 25, 1979. On July 6, 1979, however, the agency issued its notice of decision that appellant would be removed effective July 25, 1979. On July 9, the appellant submitted a second resignation request, effective July 24, 1979. The second resignation request was accepted by the agency, effective July 24, 1979.

The appellant's petition for appeal did not request a hearing. However, both the appellant and the agency made submissions into the record before its close on October 10, 1979. By initial decision filed October 30, 1979, the presiding official found that the appellant failed to establish a basis for his claim that his resignation was forced. The appellant had discussed with agency officials the possibility of resigning before the effective date of his proposed removal but the agency had not suggested nor requested his resignation. The presiding official, citing applicable case law, found that it was the appellant who decided voluntarily to resign, when to submit his resignation, and when to set its effective date. The appellant's appeal was dismissed "on the basis that it does not come within the purview of 5 U.S.C. Sections 7511-7514, and does not otherwise fall within the appellant jurisdiction of the Board."

The appellant timely filed a letter constituting his petition for review with the Board on December 3, 1979, in which he alleges that his resignation was brought about by the possibility of his removal by the agency.[1] As removal could possibly affect his future employment and ability to support his family, he resigned. The appellant asserts "this seems to be a forced resignation and should be considered as such." The agency's responsive pleading filed on January 11, 1980, asserts that the appellant was not forced to resign but freely chose to resign and that his petition does not meet the criteria for review.

The appellant's objections to the initial decision of the presiding official are not supported by references to applicable laws or regulations, or with specific reference to the record. 5 C.F.R. 1201.115. Nor does the petition establish that new and material evidence of the involuntariness of his resignation is available that, despite due diligence, was not available when the record was closed, or that the decision of the presiding official is based on an erroneous interpretation of statute or regulation. *Id.*

The petition for review simply fails to meet any of the criteria for review.

Accordingly, the petition for review of the initial decision of the presiding official is DENIED. This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 7, 1980*

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[1] The appellant's petition also asserts that testimony was adduced at a separate Field Office hearing for another employee on November 20, 1979, subsequent to the closing of the record, that allegedly indicates that the physician's signature on the drug prescriptions was not forged. While this new evidence could be material to the agency's charges against him had the proposed removal action been effected, the appellant's prior resignation foreclosed review of the removal action. This proposed evidence is not material to the issue of the voluntariness of the appellant's resignation, and absent a timely showing by the appellant that the agency "knew or believed that the proposed termination could not be substantiated," *Leone* v. *United States*, 204 Ct. Cl. 334, 340 (1974), or that "an arguable basis for discharge," *Christie* v. *United States*, 518 F.2d 584, 588 (Ct. Cl. 1975), did not exist, the fact, standing alone, that appellant's removal was proposed does not render the resignation involuntary.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ANTHONY J. BARBER
v.
DEPARTMENT OF THE ARMY

Docket No.
DA075209016

OPINION AND ORDER

Anthony J. Barber's petition for review of the initial decision of the presiding official, issued on October 18, 1979, is hereby DENIED for failure to satisfy the requirements for a petition for review.

As paraphrased in the conclusion of the initial decision, the regulations of the Board provide that a petition for review must, at minimum, allege that the initial decision was based on an erroneous interpretation of statute or regulation, or that new and material evidence is available that was not available when the record on appeal was closed. 5 C.F.R. 1201.115. *See also Mahler* v. *Marine Corps*, 1 MSPB 441 (1980). Mr. Barber's petition, however, merely reiterates the bases for appeal argued before the presiding official. This is not sufficient to trigger a complete review of the record on appeal. As held in *Weaver* v. *Department of the Navy*, 2 MSPB 297, 299 (1980) the Board will not undertake the burden of a complete review if the petitioning party does not explain in the petition why the challenged determination is incorrect, and identify the specific evidence in the record which demonstrates the error, as our regulations plainly require.

Accordingly, the initial decision dated October 18, 1979, represents the final decision of the Board. Mr. Barber is hereby advised of his right under 5 U.S.C. 7703 to appeal this decision to the United States Court of Claims or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty calendar days of receipt of this decision by the Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 7, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WILLIAM GRANT
v.
DEPARTMENT OF THE NAVY

Docket No.
AT075299005

OPINION AND ORDER

Appellant was removed from his position of Laborer, GS-2, at the Naval Supply Center, Naval Base, Charleston, South Carolina, effective February 20, 1979, for excessive unauthorized absences. Specifically, appellant was charged with being AWOL for nine days in December of 1978. The agency also considered two previous disciplinary actions involving unauthorized absences on the part of appellant: a letter of reprimand in May of 1978, and a 5-day suspension in August of 1978.

The presiding official sustained the agency action in his May 15, 1979 initial decision, noting that appellant had offered no facts in support of his assertions that he had been involved in some trouble in December, that he had requested an individual to contact his supervisor but that the person had failed to do so, and that he had been otherwise unable to contact his supervisor on his own.

Appellant has filed a petition for review dated June 16, 1979, whereby he seeks to remedy the above noted deficiencies. 5 U.S.C. 7701(e)(1) provides, in pertinent part, that the initial decision of the presiding official shall be final unless a petition for review is filed by one of the parties. Such a petition must meet the Board's applicable criteria for review, which in this case are those set forth in the Board's interim regulations at section 1201.113, in effect at the time of the instant appeal. We find that the petition and accompanying documentation, while tending to fill in certain gaps which had existed in appellant's explanation of the December 1978 absences, meet none of the applicable criteria for review.

Appellant informed the Board's field office by letter dated January 23, 1980 that he would like to add another charge of discrimination against the Labor and Equipment Branch of the Naval Supply Center. Although appellant was informed by letter dated February 7, 1980 of the proper address for making the charge, to date, no such charge of discrimination has been received by the Board.

Accordingly, the petition for review is DENIED.

The appellant is hereby notified of his right to petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review the Board's decision provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

Ersa H. Poston.

Washington, D.C., *August 8, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ANNA BUCKNER
v.
VETERANS ADMINISTRATION

Docket No.
SL315H99010

OPINION AND ORDER

Appellant was terminated effective June 25, 1979, during her probationary period, for post-appointment reasons. She appealed, claiming that she had not been advised of proper appeal procedures and that she was entitled to Workman's Compensation.

The appeal was dismissed by the presiding official of the Board's St. Louis Field Office as not being within the purview of the Board's appellate jurisdiction. Appellant's petition of August 21, 1979 requests a review of that jurisdictional determination. We hold that the presiding official's dismissal of the appeal was proper.

Terminated probationary employees have no statutory right of appeal to the Board. 5 U.S.C. section 7511(a)(1)(A). However, certain regulatory appeal rights to the Board may be provided by the Office of Personnel Management under 5 U.S.C. section 1205(a)(1). Such regulatory appeal rights may not conflict with the provisions of the Civil Service Reform Act of 1978, Pub. L. 95-454, section 902, 92 Stat. 1223 (the Reform Act).

By regulations dated December 29, 1978, provision was made for certain regulatory rights of appeal to the Board. *See* 44 F.R. 60857 and 5 C.F.R. 772.301 (1979). Included in these regulations was 5 C.F.R. 315H governing probationary employees. Specifically, section 315.806, which was impacted by Reorganization Plan No. 1 of 1978, 44 F.R. 1053 (January 3, 1979), and subsequently amended, 44 F.R. 48951 (August 21, 1979), provides that probationary employees may appeal to the Board from terminations allegedly based upon marital status or partisan political reasons, and those allegedly not effected in accordance with the procedural requirements of section 315.805, which section concerns terminations of probationary employees for pre-appointment reasons.

Appellant was terminated for *post-appointment* reasons. As she *did not* allege that the action was based upon marital status or partisan political reasons, the dismissal of the appeal was proper.

Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of her right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 8, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

In the matter of:
CHARLES B. COFFIELD
MINE SAFETY AND HEALTH
ADMINISTRATION
WHEELING, WEST VIRGINIA
AND
HONORABLE RAY MARSHALL
SECRETARY
DEPARTMENT OF LABOR
WASHINGTON, D.C., ET AL.

Docket No.
HO120800009ab

ORDER

This matter is before the Board on the petition of the Acting Special Counsel[1] for compliance with the orders of the Board staying the removal of Charles B. Coffield from his position as a coal mine inspector with the Mine Health and Safety Administration (M.S.H.A.) and imposing certain conditions on M.S.H.A. during the pendency of the stay. On April 3, 1980, the Special Counsel filed a Petition for Stay of Personnel action pursuant to 5 U.S.C. § 1208, alleging that there were reasonable grounds to believe that Coffield's removal was proposed in violation of 5 U.S.C. § 2302(b)(8)-(11). On April 7, 1980, the Chairwoman issued an order pursuant to 5 U.S.C. § 1208(a) staying Coffield's removal for 15 days. That order expressly stated that (MSPB Docket No. H0120800009, par. 2):

> The Mine Safety and Health Administration of the Department of Labor shall immediately reinstate Charles Coffield in his position as a Coal Mine Inspector, GS-1822-12 and shall not impose upon him any requirement which is not required of any other employee of comparable position, salary or grade level.

In response to requests from the Special Counsel, the Board by order of April 22, 1980, extended the stay for an additional 30 days under 5 U.S.C. § 1208(b) and thereafter, by order of July 18, 1980, for an additional 60 days under 5 U.S.C. § 1208(c). The stay currently is due to expire on August 31, 1980.

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[1] Hereafter referred to as the Special Counsel.

On June 30, 1980, the Special Counsel filed her Petition for Compliance alleging that the Department had failed to comply with the Board orders staying Mr. Coffield's removal. By order dated July 2, 1980, the Board directed the Special Counsel to submit supporting documents evidencing specific instances of noncompliance. On July 11, 1980, the Special Counsel filed an Addendum to Petition for Compliance, attaching an affidavit of Mr. Coffield dated July 7, 1980, and a copy of a memorandum from Ronald L. Keaton, M.S.H.A. District Manager, to Coffield. By that memorandum, Keaton informed Coffield that a determination of his eligibility for a within grade salary increase, for which the waiting period expired on June 15, 1980, would be withheld "pending the outcome of the adverse action proceedings" against him. In his affidavit, Mr. Coffield stated that since he returned to work on or about April 9, 1980, pursuant to the Board's order of April 3, 1980, he had not been allowed to perform the regular duties of a mine inspector.

On July 25, 1980, the Board ordered the Department to respond to the Special Counsel's allegations, and the Department filed its Response to Petition for Compliance on August 1, 1980. In its response, the Department admitted that it has relegated Mr. Coffield exclusively to office work assignments. The Department also admitted that a determination of Mr. Coffield's eligibility for a within grade salary increase is being withheld because of the adverse action pending against him. Thus, the Department's admissions establish that it is in violation of the Board's initial order of April 3, 1980, and the orders of April 22, 1980 and July 18, 1980 extending the terms and conditions of the initial order.

The purpose of a stay order is to preserve the status quo. *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977); *Reed v. Rhodes*, 472 F. Supp. 603, 605 (N.D. Ohio 1979). For that reason, the Board includes in the terms of its orders staying personnel actions a requirement that the agency not impose upon the employee "any requirement which is not required by any other employee of comparable position, salary or grade level." See, *In the Matter of Charles B. Coffield, et al.*, MSPB Docket No. HQ120800009, Order dated April 7, 1980, par. 2. In short, the effect of a Board Order staying an employee's removal is not merely to assure that the employee continues regularly to receive a government check. The stay order also assures that the terms and conditions of the individual's employment are not significantly different from those of similarly situated employees during the effective period of the stay.

Accordingly, all M.S.H.A. employees, including District Manager Ronald L. Keaton or his successor, who have taken, directed, recommended or approved any personnel action against Charles B. Coffield in this matter are hereby ordered to comply immediately with the Board's orders. Those same employees are further ordered to file affidavits on or before August 18, 1980, showing cause, why the Board should not impose the sanctions against them provided by 5 U.S.C. § 1205(d)(2) and 5 C.F.R. § 1201.43.

For the Board:

RUTH T. PROKOP,
Chairwoman.

August 11, 1980

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DARREL F. SHEPARD
v.
U.S. DEPARTMENT OF AGRICULTURE

Docket No.
DE315H99006

OPINION AND ORDER

The petition for review filed by appellant, Darrel F. Shepard, from the initial decision which dismissed his appeal, is DENIED.

Appellant was removed from his position as Range Conservationist with the U.S. Department of Agriculture, Forest Service, while serving a one year probationary period. Appellant appealed the dismissal, alleging he was discharged for reasons of discrimination based on his religion.

As the presiding official held, the Board has no statutory authority to entertain appeals from probationary employees discharged before the one year probationary period is completed. 5 U.S.C. 7511(a)(1)(A). Prior regulatory authority which gave probationary employees appeal rights to the Board when termination was allegedly due to discrimination based on religion, 5 C.F.R. 315.806, was superseded by Executive Order 12106, December 28, 1978, which transferred jurisdiction in such appeals to the Equal Employment Opportunity Commission, pursuant to Reorganization Plan No. 1 of 1978.

The Board, therefore, has no jurisdiction over Federal employee appeals based on alleged religious discrimination, *unless* such allegation is raised in conjunction with a matter otherwise within the Board's jurisdiction. 5 U.S.C. 7702(a)(1).

The appellant's attempt to invoke the Board's jurisdiction by adding an allegation that the action was taken due to his marital status, which was not raised to the presiding official, is insufficient. Under applicable regulations, the Board may grant a petition for review if there is new and material evidence which was not previously available to the petitioner despite due diligence.[1] We find that appellant's belated attempt to raise a new issue does not meet this test.

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[1] The interim regulations of the Board apply in this case since it was initiated while they were effective. However, the final regulations made no substantive change in the "new and material evidence" requirement. 5 C.F.R. 1201.113, 44 Fed. Reg. 3952, Jan. 19, 1979, amended and codified at 5 C.F.R. 1201.115, June 29, 1979.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 12, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MICHAEL E. HADLEY v. DEPARTMENT OF THE NAVY	Docket No. PH315H99039

OPINION AND ORDER

Petitioner appealed from a decision of the Department of the Navy, Naval Air Station, Willow Grove, Pennsylvania, which terminated him from the position of Firefighter-Trainee, GS-00081-4, due to unsatisfactory performance of duties during his probationary period.

In the initial decision, the presiding official held, pursuant to 5 C.F.R. 315.806 (1979), that employees may only appeal a probationary termination taken for reasons arising after appointment based upon certain forms of discrimination. Specifically, allegations of discrimination based on political partisan activity or marital status must be made in order to bring the appeal within the scope of the Board's appellate authority.

However, petitioner alleged neither of the aforesaid; rather, he alleged discrimination based upon a physical handicap. The appeal was therefore dismissed.

The statutory right of appeal is granted to employees pursuant to 5 U.S.C. sections 7511-7514, and 7701-7702 (1978). Employees serving a probationary period, however, are excluded from this statutory right. See 5 U.S.C. 7511 (a) (1) (1978).

The Board therefore finds that petitioner has only the regulatory right of appeal referenced in the initial decision, the requirements of which were not met. While petitioner contends that the Board has jurisdiction of this appeal pursuant to 5 U.S.C. 7702 (1978) because of his allegation of discrimination based on a physical handicap, we find that this section of the Code is applicable only to those cases where the action to which the allegation of discrimination attaches is appealable, and does not serve to grant jurisdiction to the Board where the action is not appealable. 5 C.F.R. 1201.3(a)(5) (1979). As we have here found, a probationary termination alone, that is, absent the allegation of discrimination, is not appealable to the Board. Only if an allegation had been made that the action was taken because of marital status or partisan political reasons would section 7702 provide a basis for considering the allegation of discrimination based on physical handicap which petitioner seeks to raise. Therefore, the Board finds that the regulatory criteria for review are not met. See 5 C.F.R. 1201.115 (1979).

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board. Petitioner is hereby advised of his right to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 12, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WALTER LEW, ET AL.	Docket No.
v.	SF075299094
DEPARTMENT OF THE TREASURY	

OPINION AND ORDER

The positions of appellants Walter Lew, Alma T. Summers, Jessie Williams, Lynn M. Black, Rosie M. Stewart and Ellen D. Rockett were found to be overgraded and were reclassified by the agency, effective June 17, 1979.

They appealed, and the presiding official in his initial decision of September 26, 1979 consolidated their appeals for adjudication pursuant to the authority of 5 C.F.R. section 1201.36, and then dismissed the appeals as not being within the purview of the appellate jurisdiction of the Merit Systems Protection Board (the Board).

By petition dated October 26, 1979, the appellants' representative requested review of the presiding official's jurisdictional determination.

We find that the dismissal of the instant appeals was proper. Appellants, as incumbents of positions which were reduced in grade after January 10, 1979, the effective date of the Civil Service Reform Act of 1978 (the Reform Act), were entitled to and were provided the grade and pay retention benefits of the Reform Act. 5 U.S.C. section 5361 *et seq*. An action which is the basis for entitlement to grade and pay retention benefits may be appealed only to the Office of Personnel Management under 5 U.S.C. section 5112(b) or section 5346(c).[1] 5 U.S.C. section 5366(a)(2). Such action is not appealable under any other appeal procedures. 5 U.S.C. section 5366(b)(1). Therefore we find that the instant reclassification actions are not appealable to the Board under 5 U.S.C. section 7701.

Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellants are hereby notified of their right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellants' receipt of this decision.

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[1] An action which is the basis for grade and pay retention benefits may be appealed to the Board in only one circumstance, which is not relevant to the instant appeals: where the retention benefit rights arose as a result of a reduction-in-force action taken by the agency under 5 C.F.R. Part 351. *See* 5 U.S.C. section 5366(a)(2)(B).

For the Board:

Ersa H. Poston.

Washington, D.C., *August 12, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CALVIN O. DECKER
v.
DEPARTMENT OF
THE AIR FORCE

Docket No.
AT035109018

OPINION AND ORDER

The appellant was downgraded from the position of Road and Grounds Maintenance Foreman, WS-9, to Grounds Maintenance Foreman, WS-7, effective September 16, 1979, through reduction-in-force procedures. His appeal to the Board's Atlanta Field Office was received on November 19, 1979, more than 2 months after the effective date of the action.

A petition for appeal to the Board must be filed within 20 days of the effective date of the action appealed. 5 C.F.R. 1201.22(b) (1979). A presiding official may, however, waive a Board regulation in an individual case for "good cause shown." 5 C.F.R. 1201.12 (1979). Accordingly, the Field Office afforded appellant an opportunity to show good cause for waiver of the time limit in his case, and he responded by letter received on December 4, 1979. Thereafter, by initial decision issued on January 16, 1980, the presiding official found that: (1) the agency had informed appellant, at the time the downgrading action was proposed, of the administrative appeal available; (2) that although the time limit specified by the agency was 15 calendar days instead of the 20 days provided for by Board regulation, this error was harmless since appellant delayed for more than 2 months before filing; and (3) that the explanation proffered by appellant, i.e., that he delayed filing until he consulted with agency personnel, showed that appellant failed to exercise due diligence in timely pursuing the appeal. The appeal was, therefore, dismissed as untimely filed.

In his petition for review of the initial decision, received by the Board on February 19, 1980, the appellant primarily disputes the merits of the agency's downgrading action. With respect to the untimely filing of the appeal, appellant argues that even after he decided to forgo the assistance he had sought from his command, he was required to compile the various information necessary to the filing of the appeal, all of which was time consuming.

Section 1201.115 of the Board's regulations provides that the Board may grant a petition for review when the requesting party meets certain criteria. The initial decision in this case informed appellant, in detail, of the criteria for filing such a petition. Nonetheless, the instant petition neither cites any of the required criteria, nor presents argument or documentation tending to meet any criterion for review. Specifically, the Board finds no showing of new and material evidence that, despite due diligence, was not available when the record was closed; and no showing that the decision of the presiding official was based on an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115 (1979). The instant petition merely amplifies the reason previously asserted by the appellant for the untimely filing. This reason was considered by the presiding official and not found to constitute good cause for waiving the time limit for filing the appeal.

Accordingly, we find no basis on which to reopen the case, and the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board. The appellant is hereby advised of his right to seek judicial review of the Board's final decision by filing a civil action in an appropriate circuit of the U.S. Court of Appeals or in the Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 12, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ELIJAH DRAYTON v. DEPARTMENT OF THE NAVY	Docket No. AT075299049

OPINION AND ORDER

The appellant was removed from a position with the Naval Regional Medical Center, Charleston, South Carolina. He appealed to the Board's Atlanta Field Office. In the initial decision, the presiding official found the charges against the appellant to be supported by a preponderance of the evidence and sustained the removal action. In the petition for review, the appellant requested additional time in which to obtain new medical evidence relevant to his case.

The appellant was removed for excessive unauthorized absence. He had been off work over 90 days allegedly because of an on-the-job injury. Following the injury, however, the appellant was examined by two different physicians at the request of the agency. Neither found evidence of injury or abnormality and indicated that the appellant could return to work. He never submitted medical evidence to the agency or the presiding official which demonstrated incapacity for work during the period of unauthorized absence. In his petition for review, the appellant set forth the basis for "a 30 day continuance to seek to obtain further medical diagnosis, treatment and evidence relevant to his case." The Board considered this a request for additional time to perfect a petition for review based upon the availability of new and material evidence. 5 C.F.R. 1201.115(a). By letter dated October 22, 1979, the Board granted the appellant's request for an extension of 30 days. To date, however, nothing further has been submitted on this case. Therefore the Board finds that there has been no showing that new and material evidence is now available on this case. Further, there has been no argument that the initial decision was based upon erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115(b).

Accordingly, neither of the criteria of 5 C.F.R. 1201.115 having been met, the petition for review is DENIED. This is a final decision of the Merit Systems Protection Board on this case. The appellant is hereby informed of the right to petition for judicial review in the U.S. Court of Appeals for the appropriate circuit or in the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 12, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ARTHUR D. JOHNSON v. UNITED STATES POSTAL SERVICE	Docket No. DA075209052

OPINION AND ORDER

By petition under 5 C.F.R. 1201.115 (1979), appellant seeks Board review of the initial Field Office decision of December 18, 1979.

Appellant was removed from his position effective October 5, 1979, and filed an appeal with the Board's field office on October 24, 1979. Thereafter, on November 19, 1979, appellant filed a formal complaint on discrimination with the Postal Service. The appeal was dismissed by the presiding official under 5 C.F.R. 1201.154(a) (1979) on the ground that since a complaint of discrimination was pending before the agency, the Board lacked jurisdiction to entertain the adverse action until the agency issued a final decision on the complaint, or 120 days elapsed from the filing of the complaint.

5 U.S.C. 7702 and 5 C.F.R. 1201.154 provide for the choice of proceeding before the agency on either a discrimination complaint or in a negotiated grievance procedure, or appealing directly to the Board. If an employee chooses initially to proceed before the agency on a complaint of discrimination, 5 C.F.R. 1201.154(a) clearly provides that the Board cannot take jurisdiction of an appeal unless the agency has issued a final decision in the case, or has not issued a decision within a 120-day period. However, 5 C.F.R. 1201.154(c) requires the appellant to "*either* file a timely complaint of discrimination with the agency or appeal to the Board within 20 days after the effective date of the agency action being appealed." 5 C.F.R. 1201.154(c) (Emphasis added). Therefore, any decision by the appellant to subsequently file a complaint of discrimination before the agency does not delay the jurisdiction of the Board under 5 C.F.R. 1201.154.

Furthermore, 5 C.F.R. 1201.155 states, "an appellant may raise an allegation of discrimination at any time during the Board's consideration of the appeal of the agency's action, *if the appellant did not know of the existence of a basis for the allegation at the time the petition for appeal was filed.*" 5 C.F.R. 1201.155(a)

(Emphasis added). This section also provides that in such cases, upon written agreement of the parties, the presiding official "may remand the discrimination issue to the agency for consideration, *if the presiding official determines to do so would be in the interests of justice.*" 5 C.F.R. 1201.155(c) (Emphasis added). This section indicates that even when the petitioner is not initially aware of the discrimination, the Board will not surrender jurisdiction to an agency simply by the unilateral act of filing a complaint of discrimination with the agency. Therefore, in a case where the petitioner was aware of the discrimination, yet initially chose to bring his action before the Board, the Board need not delay its jurisdiction unless the parties agree, and the presiding official finds to do so would be in the interests of justice. *See, Cardenas v. U.S. Postal Service,* 1 MSPB 560 (1980), *Allen v. Veterans Administration, Long v. United States Postal Service,* 2 MSPB 417 (1980).

Accordingly, the decision below to dismiss the appeal is REVERSED, and the case is hereby remanded to the field office for a new adjudication consistent with this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 12, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WALLACE W. ROSE
v.
DEPARTMENT OF TRANSPORTATION

Docket No.
DC075299020

OPINION AND ORDER

By letter dated February 16, 1979, petitioner was notified of a decision by the Federal Aviation Administration, Department of Transportation, reassigning him, at the same grade and pay, from his position as Air Traffic Control Specialist, Europe, Africa and Middle East Region to Air Traffic Control Specialist, Rocky Mountain Region.[1] His appeal to the Washington, D. C. Field Office of the Board was dismissed for lack of jurisdiction. He now seeks review of that decision.

As the presiding official correctly stated in the initial decision, a reassignment is not an adverse action appealable to the Board. Under 5 U.S.C. 7512 and 5 C.F.R. 752, those actions appealable to the Board are limited to a removal, a suspension for more than 14 days, a reduction in grade or pay, or a furlough for 30 days or less. Hence, the Board has no jurisdiction over a reassignment to a position of equal grade and pay, and none of the allegations raised by the petitioner, concerning the agency's alleged failure to comply with a 1978 Civil Service Commission order for corrective action in a previous appeal, serve to make the reassignment an appealable action. The first reassignment action was a separate matter, without effect on the Board's regulatory or statutory authority to hear the instant appeal. While the agency's alleged non-compliance with the decision could have been raised to the appropriate authority at the time it occurred, it is not material to the issue in this appeal.

Accordingly, the petition for review is hereby DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the

appropriate United States Court of Appeals or the United States Court of Claims no later than 30 days after receipt of this decision.

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[1] The record indicates that petitioner, originally assigned to the Rocky Mountain Region, never actually reported for duty at his European assignment, which was cancelled upon order of the Federal Employee Appeals Authority in September 1978, after which petitioner was temporarily detailed to remain in the Rocky Mountain Region and to which he has now been permanently reassigned.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 13, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DALTON PIXLER
v.
VETERANS ADMINISTRATION

Docket No.
DE075299013

OPINION AND ORDER

Appellant was employed until his removal effective April 30, 1979, as a Housekeeping Aid at the Veterans Administration Hospital, Fort Lyon, Colorado.

On the appeal to the Field Office from appellant's removal, the presiding official issued a decision on June 14, 1979, in which he found that the preponderance of the evidence supported the charge that the appellant was "inalert and sleeping during working hours." He further found, however, that the agency had imposed a harsher penalty than its table of penalties established for this offense. Consequently, the presiding official concluded that the removal was too severe and did not promote the efficiency of the service. The presiding official reversed the agency action and ordered the agency to cancel the Notification of Personnel Action, SF-50, documenting the appellant's removal. Subsequently, the agency submitted the required evidence of the cancellation of the removal.

After the removal cancellation, the agency proposed to suspend the appellant for 20 days based on the same charge as was advanced to support the removal. The agency later reduced the action to a 14-day suspension. There is no right of appeal to the Board from a suspension of 14 days or less. 5 U.S.C. 7503; 5 C.F.R. 752.201 *et seq*.

A petition for enforcement of the final decision issued under the Board's appellate jurisdiction, however, was submitted to the Field Office which rendered the initial decision. 5 C.F.R. 1201.181. The Field Office dismissed the petition because it was found that the agency had complied with the order in the final decision, that the agency cancel the removal and report this compliance to the Field Office.

From that dismissal, the appellant has filed a petition for review.[1] The agency responded in opposition.

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[1] A petition for review of a decision by the Chief Appeals Officer on a petition for enforcement may be filed under 5 C.F.R. 1201.114 and 5 C.F.R. 1201.115.

The Board finds that the Field Office was correct in dismissing the petition for enforcement. The corrective action of cancellation of the removal was complied with by the agency and evidence of such compliance was furnished. There was no further enforcement or compliance required of the agency by the prior Field Office decision in the removal case.

The presiding official, in the removal case decision, ruled that the penalty was too severe for the stated offense and, therefore, that the removal did not promote the efficiency of the service. Although he sustained the offense charged, he found that the maximum penalty which the agency could have imposed under its table of penalties was a 10 work day suspension. There is no language in his decision which could be interpreted to bar the imposition of that or a lesser penalty upon further action by the agency for the same reasons. Furthermore, contrary to the statement in the appellant's petition for review to the Board, the 14 calendar day suspension from July 11 through July 24, 1979 was actually for only 10 work days and, therefore, did not exceed the maximum appropriate penalty discussed in the Field Office removal decision.

Since the presiding official sustained the charge but reversed the action only because the penalty of removal was too severe, there was no bar to a subsequent action on the same charge, under the doctrine of res judicata or otherwise. See *Jenkins v. Macy,* 357 F.2d 62 (8th Cir. 1966); *Foster v. Laroque,* 246 F. Supp. 911 (E.D. La. 1965), affirmed 369 F.2d 399 (5th Cir. 1966). There is no inconsistency between the subsequent suspension action by the agency and the prior appellate decision by the presiding official on the removal action. In addition, there was no reason for the agency to "appeal" the removal action, as the appellant contended it should have done, if it intended to comply by cancelling the removal, notwithstanding its subsequent suspension action.

Under the circumstances, the petition for review of the enforcement petition dismissal is DENIED in that the review criteria of 5 C.F.R. 1201.115 have not been met.

With respect to the appellant's request for oral argument, the Board may hear oral arguments in any case reopened or reviewed. 5 C.F.R. 1204.116. The issues raised, as applied to the facts in this case, do not warrant hearing oral arguments. Therefore, it is deemed as unnecessary and inappropriate in this case.

This is the final decision of the Merit Systems Protection Board in this case.

Appellant is advised that he may file a civil action in an appropriate U. S. Court of Appeals or the Court of Claims within thirty (30) days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 15, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOHN J. O'HALLORAN
v.
DEPARTMENT OF AGRICULTURE

Docket No.
SF315H99004

OPINION AND ORDER

Appellant was removed during his probationary period, effective February 2, 1979, for post-appointment reasons. He appealed, claiming that the agency's action had been arbitrary.

The appeal was dismissed as not being within the purview of the appellate jurisdiction of the Merit Systems Protection Board (the Board), and appellant's petition requests a review of that jurisdictional determination. We hold that the presiding official's dismissal of the appeal was proper.

Terminated probationary employees have no statutory right of appeal to the Board. 5 U.S.C. 7511(a)(1)(A). However, certain regulatory appeal rights to the Board may be provided by the Office of Personnel Management under 5 U.S.C. 1205(A)(1). Such regulatory appeal rights may not conflict with the provisions of the Civil Service Reform Act of 1978 (the Reform Act).

By regulations dated December 29, 1978, provision was made for certain regulatory rights of appeal to the Board. (*See* 44 F.R. 60857 and 5 C.F.R. 772.301). Included in these regulations was 5 C.F.R. 315H governing probationary employees. Specifically, section 315.806, which was impacted by Reorganization Plan No. 1 of 1978, 44 F.R. 1053 (January 3, 1979) and subsequently amended, 44 F.R. 48951 (August 21, 1979), provides that probationary employees may appeal to the Board from terminations allegedly based upon marital status or partisan political reasons, and those allegedly not effected in accordance with the procedural requirements of section 315.805, which section concerns terminations of probationary employees for pre-appointment reasons.

Appellant was terminated for post-appointment reasons. As he did not allege that the action had been based upon his marital status or upon partisan political reasons, the dismissal of the appeal was thus proper.

We note that appellant's notice of termination stated that he did have a right of appeal to the Board. This is only true for probationers in the limited circumstances described herein. As an agency cannot know, when it prepares the notice, whether the terminated probationer will allege those circumstances which will bring his appeal within the Board's jurisdiction, inclusion of that appeal right is not necessarily erroneous. However, an agency cannot confer appeal rights where none exist under law, rule, or regulation. *See* 5 U.S.C. 7701 (a).

Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 15, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARY C. PITTMAN
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
DA075209041

OPINION AND ORDER

Appellant filed a petition for appeal with the Board's Dallas Field Office on November 9, 1979, alleging that her resignation, on an unspecified date in September 1979, was involuntary. Appellant requested reinstatement to her former position with full restitution.

The Field Office, by letter dated November 16, 1979, requested that appellant: (1) provide information or evidence as to why she considered her resignation involuntary, and (2) show good cause why she had not filed her petition within twenty (20) days of the effective date of the action appealed, as required by 5 C.F.R. Section 1201.22 (1979). Appellant was informed that she would be afforded "fifteen (15) days from receipt of this correspondence to submit (her) response." Enclosed with the letter was a copy of MSPB Form 20,[1] which the letter indicated was "for (her) use if (she) desired."

Appellant responded to the Field Office request by letter dated November 19, 1979, stating, in pertinent part, that she had initially appealed the action by mailgram on October 10, 1979. In addition, appellant completed and returned the MSPB Form 20, a copy of which shows that it was stamp-dated as received by the Field Office on December 4, 1979,[2] and therein she claimed that she had been "threatened, intimidated, asked to sign papers against (her) will, and asked to quit (her) job on more than one occasion."

The initial decision of the Field Office, issued on November 30, 1979, found that: (1) appellant had "failed to furnish any information or argument for further consideration" in respect to the issue of the timeliness of the appeal, and (2) appellant "submitted no information to show, nor has she even alleged for that matter, that the resignation was a result of duress, intimidation, threat, or reprisal." The appeal was dismissed as both untimely and not within the Board's adverse action jurisdiction.

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[1] A form designed to elicit the essential factual data in connection with appeals to the Board's Field Offices.

[2] Appellant alleges that the Form 20 was mailed to the Field Office on November 30, 1979.

Appellant thereafter filed a timely petition to the Board wherein she requested a review of the Field Office decision and an opportunity to "appear before the Board with adequate legal counsel" to present her case. Further, appellant subsequently submitted two other letters which essentially disputed the Field Office's findings as to the timeliness of the appeal and the Board's jurisdiction in the matter. In its response of February 6, 1980, the agency set forth a summary of the events which occurred prior to the disputed resignation, and argued that appellant's resignation was purely voluntary. The agency also submitted a copy of various documents relating to the resignation by letter dated February 13, 1980.

5 C.F.R. Section 1201.57 (1979), which contains the Board's regulations on closing the record, provides that: (1) when there is a hearing, the record will normally be closed at the conclusion of the hearing, and (2) if the appellant waives a hearing, "the record shall be closed on the date set by the presiding official as the final date for the receipt of submissions of the parties to the matter." Thus, the Board's regulations on closing the record do not specifically cover a situation where the Field Office summarily disposes of an appeal on the basis of untimeliness or lack of appellate jurisdiction. Nonetheless, when exercising summary disposition of a case without a hearing, the procedures utilized by the Field Office must comport with basic requirements of fairness and notice, including an opportunity to respond. *Cf. Hess & Clark, Division of Rhodia, Inc. v. Food and Drug Administration*, 495 F.2d 975, 984 (D.C. Cir. 1974). Further, 5 C.F.R. Section 1201.111 (1979) does provide that "the presiding official shall prepare an initial (or recommended) decision within 25 days of the closing of the record." Implicit in this regulation is that the presiding official set a date on which the record will be closed prior to issuing his/her decision. While a formal notice of such closing may not be mandatory in every case since the closing date may be readily adduced in many instances from other actions of the presiding official, presiding officials must exercise due care when the closing is unspecified and occurs by inference.

In the instant case, it was reasonable for the appellant to have concluded, based on a plain reading of the Field Office's letter of November 16, 1979, that the record would not be closed for at least fifteen (15) days from her receipt of that letter. Assuming ordinary mail delivery time of 2 or 3 days, the record should have been left open for a response delivered personally by appellant or mailed by December 3 or 4.[5] It is, therefore, clear that appellant's submission of the MSPB Form 20 was timely filed. Moreover, the Field Office's letter of November 16, 1979, made no provision in the event appellant decided to respond to the two questions raised separately or by multiple submissions, i.e., the date of receipt of a response by appellant was not specified as an alternate date for the closing of the record. To the contrary, the reasonable inference to be drawn from the letter was that appellant had fifteen (15) days from receipt to make her submission(s).

Accordingly, the Board finds that the presiding official erred in issuing his decision on November 30, 1979, or during the time frame allotted appellant for response, and that the error significantly prejudiced the appellant inasmuch as the initial decision did not, consequently, address the timely representations and arguments presented by her in the MSPB Form 20. The Board also notes that although the initial decision cites appellant's claim of timely filing of the appeal by mailgram on October 10, 1979, it does not address the merits of this claim. An initial decision must contain findings of fact and conclusions, as well as the reasons or bases therefor. 5 C.F.R. Section 1201.111(b)(1) (1979). The material legal issues must be addressed "in a fashion that reveals the presiding official's conclusions of law, legal reasoning and the authorities on which the reasoning rests." *Spithaler v. Office of Personnel Management*, 2 MSPB 2, 2 (1980).

The initial decision dated November 30, 1979, is hereby REOPENED and VACATED, and this case is hereby REMANDED to the presiding official for further proceedings consistent with this decision and the issuance of a new initial decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 18, 1980*

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[5] 5 C.F.R. Section 1201.22 (1979) provides that the date of mailing, not delivery, is controlling unless a response is personally delivered.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES M. DALLA, ET AL. v. DEPARTMENT OF THE TREASURY	Docket No. DE075209004

OPINION AND ORDER

The positions of appellants Charles M. Dalla, Gerry L. Miller, Norman F. Russell, Lee E. Elgin, George Tapia, Fritz Mason and Mary Tadolini were found to be overgraded and were reclassified by the agency effective June 17, 1979.

They appealed, and the presiding official of the Board's Denver Field Office, in her initial decision of October 22, 1979, consolidated their appeals for adjudication pursuant to the authority of 5 C.F.R. 1201.36 (1979). She then dismissed the appeals as not being within the purview of the Board's appellate jurisdiction.

By petition dated November 14, 1979, the appellants' representative has requested that the Board review the presiding official's jurisdictional determination. The agency responded on December 19, 1979, and the Office of Personnel Management (OPM) has intervened. Both have taken the position that the initial decision of the presiding official had been correct, and that the petition for review should be denied.

We find that the dismissal of the instant appeals was proper. The appellants were incumbents of positions which were reduced in grade after January 10, 1979, the effective date of the Civil Service Reform Act of 1978, Pub. L. 95-454, Section 902, 92 Stat. 1223 (the Reform Act). As such, they were entitled to and were provided the grade and pay retention benefits of 5 U.S.C. 5361 *et seq.* An action which is the basis for entitlement to grade and pay retention benefits is appealable to OPM pursuant to 5 U.S.C. 5112(b) or 5346(c). 5 U.S.C. 5366(a)(2).[1] Such action is not appealable under any other appeal procedures. 5 U.S.C. 5366 (b)(1). Therefore we find that the instant reclassification actions are not appealable to the Board under 5 U.S.C. 7701.

Accordingly, the petition is DENIED.

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[1] An action which is the basis for grade and pay retention benefits may be appealed to the Board in one circumstance, which is not relevant to the instant appeals: where the retention benefit rights arose as a result of a reduction-in-force action taken by the agency under 5 C.F.R. Part 351. *See* 5 U.S.C. 5366(a)(2)(B).

This is a final decision of the Merit Systems Protection Board. Appellants are hereby notified of their right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellants' receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 18, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

EMILE H. SONET, JR.
v.
DEPARTMENT OF THE TREASURY

Docket No.
PH315H99019

OPINION AND ORDER

The termination of appellant's probationary appointment was based on his unsatisfactory attendance record. Appellant asserts that this record was due to a physical condition which predated his appointment and rendered him unfit to report for duty on the occasions cited in the notice of termination. He contends, thus, that the termination was due, at least in part, to pre-appointment reasons, entitling him to the procedural protections of 5 C.F.R. 315.805.

The Board finds appellant's position unsupported. Substantially the same contention was advanced to the Court of Claims in the case of *Cohen v. United States*, 384 F.2d 1001 (1967). There, the court rejected the contention, finding that when it is the employee's performance or conduct after appointment which is the cause for the termination, the greater procedural safeguards which attach to terminations based on pre-appointment reasons are not required. The Board concludes on this authority, that appellant's termination was not subject to 5 C.F.R. 315.805, and accordingly, that the presiding official properly found the appeal not to be within the purview of the Board's appellate authority under 5 U.S.C. 7511(a)(1)(A) and implementing regulations.

While appellant's contention could be considered an allegation of discrimination based on physical handicap, the Board finds that such an allegation would not render his termination an appealable matter. The regulations of the Office of Personnel Management (OPM) appeared to create such an appeal right at 44 F.R. 3441 (January 16, 1979), by adopting without change the provisions of former Section 315.806(b), Title 5, Code of Federal Regulations. However, such action was inconsistent with the terms of Reorganization Plan No. 1 of 1978 and exceeded OPM's authority. This overextension was recognized by OPM and its regulations were modified accordingly at 44 F.R. 48951-48952 (August 21, 1979).

Therefore, the petition for review is DENIED. This is the final decision of the Merit Systems Protection Board.

The appellant is hereby notified of his right to file a civil action in the Court of Claims or the appropriate circuit of the United States Court of Appeals within 30 days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOROTHY CHIARELLI
v.
DEPARTMENT OF THE TREASURY

Docket No.
NY075209035

OPINION AND ORDER

The appellant, a GS-5 Data Transcriber, who had completed a probationary period, requested after five months in that position that she be downgraded to a GS-4 Clerk position, and the agency effected the action on June 3, 1979. By petition dated October 1, 1979, appellant sought to appeal the demotion to this Board's New York Field Office, contending that the action had been an involuntary reduction in grade.

Petitions for appeal to the Board must be filed within twenty days after the effective date of the action being appealed. 5 C.F.R. 1201.22. However, the requirement for timely filing may be waived by a presiding official for "good cause shown." 5 C.F.R. 1201.12.

Since the appeal in this case was filed nearly four months after the effective date of the action, the presiding official afforded appellant an opportunity to show cause why her appeal should not be dismissed for untimely filing. After duly considering her response, the presiding official issued an initial decision wherein he found that good cause for the delay had not been shown, and he dismissed the appeal with prejudice as not having been timely filed.

On January 17, 1980, the Board received appellant's petition requesting a review of the dismissal of her appeal for untimeliness. The agency responded on April 14, 1980, requesting that appellant's petition be denied for failure to meet the criteria by which initial decisions are reviewed by the Board. *See* 5 C.F.R. 1201.115.

We find that the issue of the timeliness of the instant appeal is controlled by the case of *Alan McCormack v. United States*, 204 Ct. Cl. 371 (1974); and by our decision in the case of *Beatrice Spiegel v. Department of the Army*, 2 MSPB 307 (1980).

Accordingly, we hereby GRANT the petition for review in order to consider the timeliness of appellant's appeal in light of those cases.

We relied upon the *McCormack* case, *supra*, in finding excusable the untimeliness which existed in the *Spiegel* case, *supra*. In

McCormack, the court held that where a non-probationary federal employee requests an action (in that case, a resignation) which appears to be voluntary, but where the government knew or should have known that the employee considered the action to be involuntary, then the government, while it need not acquiesce in the employee's view, must at least inform him or her of the administrative rights attaching to such an involuntary action. The court held that absent such advice, the rule that the delay in appeal will be excused is applicable. The Court then excused the nearly 11-month delay which had existed in that case.

Upon review, we find that the agency had been put on notice that appellant considered her downgrade request to be involuntary. *See* appellant's letter of May 14, 1979, requesting the downgrade, and the memorandum and the letter, both dated May 25, 1979, from the Chief of the Data Conversion Branch. We hold that upon learning that appellant considered her request for a downgrade to be involuntary, the agency should have informed her that involuntary reductions in grade are appealable and that there is a limited time in which to exercise that right. As the agency failed to give appellant that advice, we hereby excuse, for good cause, appellant's delay in appealing, pursuant to 5 C.F.R. 1201.12.

Accordingly, the petition for review is GRANTED, and upon review, the initial decision is REVERSED and the case REMANDED for processing in accordance with this Opinion and Order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROLAND L. ROBINSON
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
SF075299052

OPINION AND ORDER

The appellant was removed from the position of Telephone Operator with the Department of the Air Force, effective March 30, 1979. He appealed his removal to the San Francisco Field Office of the Merit Systems Protection Board, where his removal was affirmed.

The appellant was informed in the initial decision issued on July 31, 1979, that a petition for review of the decision must be filed within thirty-five (35) days of receipt of the decision. The appellant was advised by the Board upon receipt of his petition for review, that the petition did not appear to have been timely filed. He was provided an opportunity to submit any written response he desired, showing good cause for the apparent untimely filing of the petition. The appellant responded to the Board's letter stating, in essence, that he had forwarded an earlier petition for review to an incorrect address, and that he did not have a permanent address of his own during a period of time after the initial hearing. He argued that he had difficulty getting his mail on a regular basis. The record in this case, however, indicates that the appellant signed a postal receipt evidencing receipt of the initial decision on August 2, 1979.

The regulations of the Board provide that a petition for review of an initial decision must be filed within thirty-five (35) days of issuance of the decision 5 C.F.R. 1201.114(b). To be timely, therefore, the petition should have been filed by September 4, 1979. The petition, however, was dated November 8, 1979, postmarked November 13, 1979, and received by the office of the Secretary on November 16, 1979. The regulations of the Board provide, further, that the Board may extend the 35 day time limit for filing a petition where good cause is shown 5 C.F.R. 1201.113(d). Having reviewed the reasons given by the appellant for the failure to file within the 35 day period, the Board finds no good cause for waiving the time limit in this case.

Accordingly, the petition for review is denied as untimely filed.

This is the final decision of the Merit Systems Protection Board in this case. The appellant is hereby advised of his right to file a civil action in an appropriate U.S. Court of Appeals or in the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BETTY M. HOBSON
v.
UNITED STATES DEPARTMENT
OF THE NAVY

Docket No.
CH075209060

OPINION AND ORDER

The petition of February 12, 1980, requesting review of the January 24, 1980, initial decision of the presiding official, is DENIED.

The initial decision of the presiding official dismissed without prejudice the appeal from appellant's removal from the position of Supply Clerk, United States Department of the Navy, Crane Army Ammunition Activity, after finding that the Board lacked jurisdiction on the matter appealed. This disposition of the case was made because the record showed that the appellant had initiated a discrimination complaint within the agency on the appealable matter, and the agency had not issued a decision on the complaint, nor had 120 days elapsed. The Board's regulations at 5 C.F.R. 1201.154(a) (1979) implementing 5 U.S.C. 7702 (a)(2) (1978), provide that the Board can accept such appeals only if the conditions cited therein, and quoted in the initial decision, prevail.

The Board notes that, the discrimination complaint has been adjudicated and as the appeal has been refiled with the field office, the events have rendered appellant's request that the Board process the appeal regardless of the agency's action, moot.

Moreover, the petition requesting review of the initial decision of the presiding official under the criteria found in 5 C.F.R. 1201.115 (1979) is DENIED for failure to establish error by the presiding official in interpreting law or regulation.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision must be filed in the appropriate U. S. Court of Appeals or in the U. S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HENRY S. HUMPHRIES v. VETERANS ADMINISTRATION	Docket No. DA075209043

OPINION AND ORDER

In the presiding official's initial decision of December 3, 1979, appellant's appeal from the agency's action of not selecting appellant for the position of Psychology Technician, GS-5/6, was dismissed. The presiding official also dismissed appellant's argument that because he had once been employed by the agency as a GS-5 he should have been reinstated at that grade and not as a Messenger Vehicle Operator, GS-2. The basis for the dismissal of the appeal cited by the presiding official was that neither statute, nor Federal regulations provide an employee with the right to appeal a non-selection for a position or a reinstatement to a position of a lower grade level, unless it is alleged by the employee that he is entitled to the same grade level position under one of the provisions of 5 C.F.R. part 352 (Reemployment Rights) or 5 C.F.R. part 353 (Restoration to Duty).

In appellant's petition for review, he again alleged that his non-selection was based on a physical handicap. Specifically, appellant stated that the agency did not select him for a higher grade position because of his personality disorder diagnosed as a paranoid personality. Appellant alleged that this fact was used against him in violation of 5 U.S.C. 2302. Appellant also alleged that 5 C.F.R. parts 352 and 353 should apply in his case but he failed to state what sections should be applied and in what way it should be applied.

Upon examination of appellant's petition, the Merit Systems Protection Board (hereinafter the "Board") finds that it has not met any of the criteria for review by the Board as set forth in 5 C.F.R. Section 1205.115. Appellant fails to cite new and material evidence that was unavailable when the record was closed. Appellant's assertion of discrimination, based on physical handicap, not connected with any action that is appealable to the Board, cannot be characterized as new evidence and is not reviewable by the Board. See 5 U.S.C. 7702.

Moreover, the appellant did not allege in his petition that the decision of the presiding official was based on an erroneous interpretation of statute or regulation. The presiding official correctly found that the agency's failure to select appellant for a higher grade position and his reinstatement to a lower grade position are not appealable to the Board under any statute or regulation. The appellant's petition failed to state what provision of regulation or statute would encompass the Board's jurisdiction. Thus, we find no basis for disagreement with the presiding official's initial decision and conclude that there is no basis on which to reopen the case.

Accordingly, appellant's petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U. S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *August 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WALTER SZCZERBIAK
v.
UNITED STATES POSTAL SERVICE

Docket No.
CH075299071

OPINION AND ORDER

Appellant was a Mail Handler at the United States Post Office, Milwaukee, Wisconsin. He was removed on June 11, 1979, for fighting while on duty, and he appealed to the Board's Chicago Field Office. In his initial decision, the presiding official found that the agency had supported its basis for the removal by a preponderance of the evidence and that the removal was for such cause as would promote the efficiency of the service. He found further, that the appellant had failed to present an affirmative defense sufficient to overcome the removal action.

Appellant, through a representative, filed a timely petition for review. The appellant alleged that new and material evidence was available which was not available at the time of the hearing in that appellant had a drinking problem "that could have been at the root of the altercation" that led to the removal action. The petition for review also alleged that the agency had copies of appellant's Program for Alcoholic Recovery (PAR) evaluation which were not sent to the Board.

The criteria for the Board's consideration of a petition is governed by the Board's regulations which state, in pertinent part, that a petition for review will be granted if it is established that "new and material evidence is available that despite due diligence, was not available when the record was closed." 5 C.F.R. 1201.115(a) (1979).

The new evidence now offered by the appellant is an allegation that he had a drinking problem which could have been at the root of the altercation.[1] The appellant also alleges that the agency had copies of forms indicating that he was involved in an alcoholic rehabilitation program (PAR) which were not forwarded to the Merit Systems Protection Board for consideration. It is alleged that as a result of the above mentioned items, the presiding official did not consider that the incident could have been caused by the appellant's drinking problem.

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[1] Although the petition for review raises additional argument relative to testimony given by witnesses, these matters are clearly not new evidence and will not be considered further by the Board. See 58 Am. Jur. 2d, Section 166.

The appellant does not explain why this defense could not have been raised prior to the close of the record. The appellant also does not explain why the PAR documentation could not have been provided prior to the close of the record. A full hearing was held on the appeal during which the appellant was represented, called witnesses on his behalf, and gave testimony in his own defense.

Failure of a party to present evidence prior to the close of the record will preclude it from doing so by way of a petition for review under 5 C.F.R. 1201.115(a) (1979), absent a showing that with due diligence the evidence was previously unavailable. *Beer v. Department of the Army*, 2 MSPB Order 226 (1980). Appellant in this case had ample opportunity to raise the defense now alleged as new evidence, and appellant has shown no reason why he could not have provided evidence in support of this defense prior to the close of the record. Accordingly the Board finds that the allegations raised in the petition for review do not meet the criteria set forth in 5 C.F.R. 1201.115(a) (1979). The petition for review is, therefore, DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD E. HARPER
v.
DEPARTMENT OF THE ARMY

Docket No.
AT315H09009

OPINION AND ORDER

The initial decision of the presiding official dismissed, for lack of jurisdiction, petitioner's appeal which alleged that his separation from the agency during the probationary period of his competitive service appointment was based on race discrimination.

An employee serving under a probationary appointment has neither a statutory right of appeal to the Board, 5 U.S.C. Section 7511(a)(1)(A), nor a regulatory right when termination is based on reasons arising after the appointment, except where the termination is alleged to have been taken because of marital status or partisan political reasons. 5 C.F.R. Section 315.806.

As the presiding official stated in the initial decision, under section 3 of Reorganization Plan No. 1 of 1978, 43 F.R. 19807 (May 9, 1978), E.O. 12106, 44 F.R. 1053 (January 3, 1979), the equal opportunity functions in federal employment previously vested in the Civil Service Commission have been transferred to the Equal Employment Opportunity Commission (EEOC). Hence, the agency's incorrect notification to the contrary notwithstanding, the Board lacks jurisdiction over the race discrimination issue raised by petitioner.[1] Therefore the petition fails to meet the criteria for review under 5 C.F.R. Section 1201.115.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

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[1] A probationary employee may appeal a claim of prohibited discrimination under the procedures described in 29 CFR part 1613. Section 1613.214(a) requires such procedures be initiated within "30 calendar days of the date of the matter, or, if a personnel action, within 30 calendar days of its effective date. . . ." However, 5 U.S.C. Section 7702(f) provides:

> In any case in which an employee is required to file any action, appeal or petition under this Section and the employee timely files the action, appeal, or petition with an agency other than the agency with which the action, appeal, or petition is to be filed, the employee shall be treated as having timely filed the action, appeal, or petition as of the date it is filed with the proper agency.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 19, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HAROLD M. RAY
v.
DEPARTMENT OF THE ARMY

Docket No.
AT075299042

OPINION AND ORDER

The appellant was removed from the position of Fire Protection Inspector, GS-5, on charges of unauthorized use of property of the United States Government, providing gratuities to military personnel, conflict of interest, and creating the appearance of a conflict of interest. He appealed his removal to the Board's Atlanta Field Office. A hearing was held at which the appellant was represented by a union official. The presiding official affirmed the removal action and the appellant timely filed the instant petition for review.

The appellant alleged, as basis for his petition for review, that the presiding official was biased and incorrectly interpreted the evidence. In support of his allegations, the appellant has merely indicated his disagreement with the presiding official's conclusions. Although the appellant has referred to several places in the transcript where the testimony was in conflict, he has pointed to nothing in the record which indicates error by the presiding official in his resolution of the conflict.

Further, even assuming *arguendo* that the presiding official erred in his resolution of the conflict, such a ruling, in and of itself, is not evidence of bias. See *In the Matter of King*, 1 MSPB 144 (1979). This is especially significant when one is analyzing demeanor evidence.

As the Board has previously stated, demeanor evidence cannot by its nature be reflected fully in the written transcript. The Board must therefore rely heavily upon the presiding official's credibility determinations when there are not other more persuasive indications of credibility included in the record. *Weaver v. Department of the Navy*, 2 MSPB 297 (1980). See also *Universal Camera Corp. v. NLRB*, 340 US. 474, 496 (1951).

The presiding official made detailed findings on the credibility issues as required. See *Spithaler v. Office of Personnel Management*, 2 MSPB 2 (1980).

We find, therefore, that the appellant has failed to state a sufficient basis for review of the initial decision.

Accordingly, the petition for review of the initial decision is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals within thirty (30) days from receipt of this decision by appellant.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 19, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

NORMAN JACKMAN
v.
FEDERAL TRADE COMMISSION

Docket No.
BN075209011

ORDER

By letter dated November 28, 1979, the Director of Personnel, Federal Trade Commission, Washington, D.C., filed a petition for review of the October 24, 1979 initial decision in the instant case.

By letter of February 20, 1980, submitted by appellant Jackman and his attorney of record, the Board was notified that a consent agreement had been entered into between the parties and that the appellant wished to withdraw his July 10, 1979 appeal. The agency then notified the Board, by letter dated April 3, of its request that processing of its petition for review be discontinued in light of the consent agreement, a copy of which was sent to the Board on April 21, 1980.

The consent agreement provides, in pertinent part, as follows:

> The remedy afforded in the preceding paragraphs is exclusive. The instant agreement constitutes a final disposition of any and all claims arising from appellant's separation from the Commission and any alleged incidents or conduct which appellant may claim resulted in the separation.

The February 20 and April 3, 1980 motions seeking cancellation are hereby GRANTED, and the petition is DISMISSED.

The Director of the Office of Personnel Management filed a petition for review in the instant case on November 28, 1979. A request to withdraw the petition because it had been rendered moot by the consent agreement and the withdrawal of the appeal was filed on June 30, 1980. Accordingly, this motion is also GRANTED, and the petition of the Office of Personnel Management is therefore DISMISSED.

This is the final decision of the Merit Systems Protection Board on this case.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 19, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RICHARD A. DRUMGOLD v. DEPARTMENT OF THE NAVY	Docket No. PH315H99004

OPINION AND ORDER

Appellant was removed during his probationary period, effective February 27, 1979, for post-appointment reasons. He appealed, claiming that the action had been based upon discrimination due to physical handicap.

The appeal was dismissed by the presiding official of the Board's Philadelphia Field Office as not being within the Board's appellate jurisdiction. Appellant's petition requested a review of that jurisdictional determination. We hold that the presiding official's dismissal of the appeal was proper.

Terminated probationary employees have no statutory right of appeal to the Board. 5 U.S.C. 7511(a) (1) (A). However, certain regulatory appeal rights to the Board may be provided by the Office of Personnel Management under 5 U.S.C. 1205(a) (1). Such regulatory appeal rights may not conflict with the provisions of the Civil Service Reform Act of 1978 (the Reform Act).

By regulations dated December 29, 1978, provision was made for certain regulatory rights of appeal to the Board. (*See* 43 F.R. 60857). Included in these regulations was 5 C.F.R. 315-H governing probationary employees. Specifically, section 315.806 provided that probationary employees could appeal to the Board a termination allegedly based upon prohibited discrimination (race, color, sex, religion, national origin, age, or physical handicap), a termination allegedly based upon marital status or partisan political reasons, or a termination which was not effected in accordance with the procedural requirements of 315.805 (concerning termination of probationers for pre-appointment reasons).

However, pursuant to the terms of Reorganization Plan No. 1 of 1978, the Equal Employment Opportunity Commission assumed exclusive jurisdiction over cases involving issues of prohibited discrimination which were formerly appealable to the U. S. Civil Service Commission. Therefore, to the extent that 5 C.F.R. 315.806 provided appeal rights to the Board based solely upon allegations of prohibited discrimination, that regulation was inconsistent with Reorganization Plan No. 1 and was therefore invalid.[1] Effective August 21, 1979, OPM amended 5 C.F.R. 315.806 in order to bring its provisions into conformity with Reorganization Plan No. 1. *See* 44 Fed. Reg. 48951. Although Section 205 of the Civil Service Reform Act of 1978 does provide the Board with authority to adjudicate issues of prohibited discrimination, it may do so only when they are raised in conjunction with an action which has a separate basis for appeal to the Board. 5 U.S.C. 7702. Since 5 C.F.R. 315.806 was rendered invalid by Reorganization Plan No. 1, it can not provide that independent basis for appeal.

Appellant has not alleged that his removal was based upon reasons of his marital status or partisan political affiliation, and has not alleged procedural violations of section 315.805. The appeal is thus outside the purview of the Board's appellate jurisdiction and the dismissal was proper.

Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 19, 1980*

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[1] Since the transfer of jurisdiction did not include termination based on marital status or partisan political reasons, the Board may still adjudicate such cases under the authority of 5 C.F.R. 315.806.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES E. MARSHALL
v.
UNITED STATES POSTAL SERVICE

Docket No.
SF075299079

OPINION AND ORDER

Appellant was removed from his position with the agency for his absence without leave from February 8, 1979 through February 23, 1979. In the presiding official's initial decision of September 7, 1979, the agency's action was affirmed. In affirming appellant's removal, the presiding official sustained the charge that appellant was absent without leave (hereinafter referred to as "AWOL"), with the exception of appellant's scheduled days off during that period. In reaching this decision, the presiding official noted that the documented evidence demonstrated that appellant has been suspended on three other separate occasions for being AWOL and that the last suspension had ended on February 7, 1979, at 7:00 a.m. Thereafter, it was appellant's failure to report to work on February 7, 1979 at 10:30 p.m. through February 23, 1979 that resulted in the agency's action of removal. The presiding official, finding the AWOL charge to be supported by the preponderance of the evidence, affirmed the agency's action. 5 U.S.C. 7701(c)(1)(B).

In appellant's petition for review dated October 11, 1979, appellant complained that the presiding official reached his decision without considering any of the evidence that he supplied. Appellant claimed that the presiding official went on with a hearing relating to his case on August 24, 1979 despite the fact that he had called the Field Office on August 23, 1979 to report that he could not attend.

Appellant argued that his dismissal should have been decided by a higher authority than the person, Mr. Curtis Todd, who signed the notice of decision to remove. In his petition, appellant admitted that he had "an *excessive* amount of illnesses and I've had *most* of these documented . . ." (emphasis supplied). Appellant finally argued that the dates of his AWOL from February 8, 1979 through February 23, 1979 were actually part of a 29 day suspension which was to begin January 10, 1979.

In response to the appellant's petition, the agency claimed that although Mrs. Lucille Ashford was the person designated to hear oral replies and recommend or make final decisions concerning employees assigned to the Terminal Annex, Mr. Curtis Todd was duly authorized to act in her place while she was on vacation. Because Mr. Todd was so authorized, the agency stated, he was appellant's superior and was, thus, able to make the final decision to remove. The agency further took exception to the appellant's petition for review for attempting to relitigate the issues.

Finally, the agency contended that due to appellant's history of being AWOL, including two prior suspensions for this charge from May 18, 1978 through May 24, 1978 and September 4, 1978 through September 18, 1978, his removal for being AWOL from February 9, 1979 through February 23, 1979 was justified and promoted the efficiency and the best interests of the service. The agency reached this conclusion by reasoning that regular attendance is a necessary and express condition of employment and that excessive absences create disruption to the operation and hardship on the employer and fellow employees. The Postal Service argued that because the imposition of progressive and corrective discipline failed to be effective in promoting better attendance, removal was the next logical step.

By letter dated January 7, 1980, appellant responded to the agency's legal memorandum by relying on his petition for review and accusing the agency of being incorrect as to dates and facts.

Upon examination of appellant's petition, the Board finds that it has not met any of the criteria for review by the Board as set forth in 5 C.F.R. 1201.115. Appellant failed to cite new and material evidence that was unavailable when the record was closed. Moreover, appellant failed to establish that the presiding official was in error in his interpretation of relevant statutes or case law.

Appellant's assertion that the presiding official reached his decision without considering the evidence that he supplied is unfounded. In the initial decision, the presiding official stated that his decision was based on the representations of both parties.

The fact that appellant did not attend the hearing on August 24, 1979 does not affect the validity of the initial decision. The evidence of record indicates that the appellant had sent a letter dated August 15, 1979 indicating that he would attend the hearing of August 24, 1979. In the "notice of hearing" dated August 6, 1979, the presiding official cautioned that "if a party fails to appear without good cause, the hearing will proceed or the case will be adjudicated on the record, as the circumstances warrant." Indeed, 5 C.F.R. 1201.51 states, "Motions for postponement by either party shall be made in writing and accompanied by an affidavit setting forth the reasons for the request and shall be granted *only upon a showing of good cause*" (emphasis supplied). In this case, appellant alleged that he called the field office on August 23, 1979 to state that he would be unable to attend the August 24, 1979 hearing. His petition did not assert, however, the reason why he wanted a postponement of his hearing. Accordingly, he did not meet the requirements of 5 C.F.R. 1201.51. Moreover, it is apparent from reviewing the hearing record that the presiding official was not aware of the appellant's alleged telephone call to his office. There is no convincing evidence that the appellant in fact called the field office for a postponement. Therefore, the presiding official was justified in reaching his conclusions on the developed record which included the representations of the parties and the transcript of the hearing on August 24, 1979.[1]

Appellant's argument that his removal should have been decided by a higher authority is erroneous. The evidence of record indicates that Mr. Curtis Todd had the authority to remove appellant. The Board also notes that Mrs. Lucille Ashford, appellant's superior, had recommended appellant's removal in a letter dated April 18, 1979, before she left on vacation and left Mr. Todd in charge of such matters. Appellant has failed to show harmful error in the application of procedures required by 5 U.S.C. 7513 and 5 C.F.R. 752.404. See 5 C.F.R. 1201.56 (b) (1).

Moreover, the Board disagrees with appellant's argument that the dates he was allegedly AWOL, February 8, 1979 through February 23, 1979, were really a part of a 29 day suspension for being AWOL at another time.[2] The notice of suspension dated December 17, 1979 clearly stated that appellant was to be suspended from January 9, 1979 through February 7, 1979 until 0700 o'clock. Appellant's return to duty was expected at 10:30 p.m. on February 7, 1979.

In view of the above facts and findings, and because the appellant's petition failed to meet any of the criteria for review by the Board, appellant's petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or the Court of Claims not later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 19,1980*

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[1] *cf. Degani v. Department of the Air Force*, 2 MSPB 81 (1980), where the Board held that failure to appear following an oral denial of postponement will result in an adjudication on the record.

[2] The Board notes appellant had a history of being AWOL prior to the dates in question. Indeed, Appellant admitted in his petition for review that he had an extensive amount of absences whose causes were not all documented.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Dale D. Clark
v.
Department of State

Docket No.
DC752S09005

Opinion and Order

Petitioner was suspended by the Agency for International Development, Department of State, Washington, D.C. The notice of decision dated July 12, 1979, stated "that suspension for 14 days without pay or duty status is justified. Accordingly, your suspension will begin on Monday July 16, 1979, and end August 2, 1979. You should report to work on Friday August 3." Thereafter, the agency, by letter dated July 24, 1979 amended the period of suspension to July 16, 1979 through July 29. Petitioner was notified of the amendment by telephone communication but declined to return to work due to his absence from the area for the purpose of attending certain meetings.

On appeal to the Washington, D.C. Field Office of the Board, petitioner asserted that he was suspended for more than 14 days, and that he was therefore entitled to those adverse action rights afforded by 5 U.S.C. 7511. He also contended that he was not accorded proper notice of the charges against him as provided in the Negotiated Agreement between the agency and the American Federation of Government Employees (AFGE).

The presiding official found that petitioner received due notice under the Negotiated Agreement and was suspended for 14 calendar days. He concluded that petitioner was therefore not entitled to appeal rights to the Board under 5 U.S.C. 7511 et seq. and dismissed the appeal for lack of jurisdiction.

This petition for review dated December 18, 1979, is based upon the alleged erroneous interpretation by the presiding official of Article XXIV, section 6, of the Negotiated Agreement. The agency, in opposition to the petition for review, contended that petitioner failed to state the specific law, rule or regulation he alleged was erroneously interpreted, citing only the Negotiated Agreement. It also argued that petitioner has submitted no new and material evidence and that therefore the petition did not meet the criteria for review.

The weight of the evidence before us indicates that the agency intended to impose no more than a 14-day suspension. It was stated on the Notification of Personnel Action Form SF-50 that the effective date of the suspension was July 16, 1979, and that the period of suspension was not to exceed July 29, 1979. The Form SF-50 was also dated July 16, 1979. In the notice of decision, petitioner was informed that he was being suspended for a period of "14 days" and was apprised, consistent with agency regulations where a 14-day or less suspension is imposed, of his appeal rights under the Agency Administrative Grievance Procedure. No appeal rights to the Merit Systems Protection Board were given. Thus, except for the error in computation contained in the letter of decision, the record reflects a clear intention by the agency to effect a 14-day suspension.

Because the agency in writing amended the computation error in the letter of decision prior to the expiration of the 14 calendar-day period, and such action was communicated to petitioner during that time frame, a 14-day suspension under 5 U.S.C. 7501 et seq. was effected, and hence, petitioner was not entitled to the adverse action rights conferred by 5 U.S.C. 7511 et seq.

Therefore, as the presiding official concluded, the Board lacked jurisdiction to entertain the appeal. In view of the foregoing finding, we decline to consider the issue of proper notice under the Negotiated Agreement. Consequently, the petition does not meet the criteria for review set forth in 5 C.F.R. 1201.115 (1979).

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. Petitioner is hereby advised of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within 30 calendar days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 22, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PATRICIA A. DEJOY
v.
DEPARTMENT OF HEALTH AND
HUMAN SERVICES

Docket No.
NY075299017

OPINION AND ORDER

The appellant was removed from a position with the Food and Drug Administration, Buffalo, New York, for impeding government efficiency. She appealed to the Board's New York Field Office. In the initial decision, the presiding official found the reasons for the removal supported by a preponderance of the evidence and sustained the removal action. In her petition for review, the appellant sets forth 12 numbered statements upon which she bases the request for review. These 12 statements shall be considered below. The agency's response stated that the substantive issues raised by appellant were fully considered by the presiding official and that no comments were offered on other issues because of the lack of specificity.

The reasons for the appellant's removal concern events during January 22, 1979, to February 6, 1979, when the appellant refused to report to a new position in compliance with an order reassigning her from the Office of the District Director to the Administrative Management Office. On January 25, 1979, the appellant's suspension and removal were proposed. On February 6, 1979, both of these proposal letters were rescinded and a new notice of proposed removal issued. In making his decision on the proposal to remove, the deciding official considered the appellant's replies to the rescinded January 25 notice as well as the February 6 notice. The appellant generally contended before the agency and the field office that she had properly refused to report for the reassignment since the agency had not provided her with a copy of the position description for the new job, and that she had been discriminated against because she had not been promoted in some six years although she had been performing duties above her grade level.

With this background, the Board turns to consideration of the statements presented in the petition for review. First, the appellant states that her "civil rights were denied her by managements (sic) barring her from seeing her file on February 5, 1979." A

February 6, 1979 memorandum from the agency Administrative Officer to the District Director reflects that the appellant was permitted to see her file on February 5, 1979. The presiding official considered this and similar allegations (concerning denial of access to documents on other dates) and found specifically that the appellant did review the record on February 5, 1979 in preparation for her reply to the January 25 proposals. The Board finds no error in this conclusion.

Next the appellant states that the filing of two consecutive proposals of removal constituted "double jeopardy." The Board finds no error in this regard. The prohibition against "double jeopardy" applies to criminal charges and these were in no sense charges of a criminal nature. *Stevenson v. U.S.*, 155 Ct. Cl. 592 (1961). Further the agency had cancelled only a proposed adverse action. No decision to remove the appellant had been made at the time of cancellation. The appellant was clearly not "punished" twice. At best the appellant's situation might be compared to a situation in which one matter is considered for indictment by more than one grand jury. Cf. *Jenkins v. Macy*, 357 F.2d 62 (8th Cir. 1966).

The third basis for requesting review is that the appellant disagrees with "the hearing officer's decision that only events taking place after February 6, 1979 are relevant." The appellant does not cite any particular portion of the record where such a "decision" was made. From review of the transcript of the hearing, the Board notes that the presiding official did find irrelevant testimony regarding an altercation between the appellant's representative and agency management when the file was reviewed on February 5th. The presiding official did allow testimony and evidence regarding the background which led to the appellant's refusing to be reassigned. We find no error in these rulings. The proposal of January 25, 1979, had been cancelled. The action at issue was proposed on February 6, 1979. The Board agrees that the manner in which the appellant had attempted to reply to the cancelled notice was not a relevant line of inquiry.

At statements four, five and seven, the appellant states that the presiding official made inconsistent or improper observations and assumptions and that there are contradictory statements by the government's witness. The appellant does not specify to what she is referring. Accordingly, the Board can give these statements no substantive review. The Board notes that at page 14 of the initial decision the presiding official discussed a disparity in testimony on the availability of the position description for the new job on and after January 23, 1979. The presiding official did not find that this affected the outcome of the case. The Board finds no error in this matter.

Statement six contains various charges of "misdeeds" on the part of agency officials in their treatment of the appellant's representative. The Board notes that the file reflects that the matter of the representative's conduct was referred to the U.S. Attorney's office for possible criminal action. The Board finds the entire matter not germane to the substantive issues in the appeal and not properly reviewable by the Board.

At number eight, the appellant presents the following:

> Agencies (sic) denial of discrimination when in fact the appellant has served some 10+ years as a GS 3 Clerk Typist, who has been shifted from position to position at the whim of the agency, and who has had, 2, (sic) GS 4 positions withdrawn from her, a person who after working for the Director's office for almost 2 years and has done the same work as GS 4, 5, and 6's that preceded her and then be referred to as a bottleneck in one division but be offered a promotion if she moves to another division and takes a job with less responsibilities, as a receptionist. In effect she was promoted to a demoted job.

The matters raised in this statement concern the appellant's justification for her refusal to accept the reassignment. These arguments were raised to the agency and were considered by the presiding official. We have held, in *Jack Ketterer v. U.S. Department of Agriculture, Federal Crop Insurance Corporation*, 2 MSPB 459 (1980), that in a removal following a refusal to accept a reassignment, the agency must prove by a preponderance of the evidence that the reassignment had been based upon legitimate management reasons. The reasons for appellant's reassignment are stated in an undated memorandum for the file, from E. Pitt Smith, that appellant was unable to perform adequately on the word-processing machine, which was a requirement of her position; that another employee was skilled at the operation of the machine; that appellant was able to adequately perform the other employee's duties, which included filing, receptionist, mailing, and photocopying; that both employees and both offices would benefit by the switching of the two employees into each other's positions; and that appellant was agreeable to the transfer on condition that she be promoted to GS-4, which condition was agreed to. Appellant has not questioned the validity of management's reasons for the reassignment; her reason for refusing to report to her new position was simply that she demanded a copy of the job description before doing so. We hold that the agency did demonstrate legitimate management reasons for the reassignment. Further, appellant has not challenged that the reassignment had been properly ordered as a *bona fide* exercise of agency discretion under 5 C.F.R.

Part 335 which was taken in the interest of promoting the efficiency of the service. Accordingly, the Board declines to review the management considerations which underlie that exercise of agency discretion. *Cf. Griffin v. Department of Agriculture*, 2 MSPB 335 (1980).

In the remainder of the petition for review, the appellant asserts that she was not properly counseled, that the penalty is too severe for a first offense and that the cost of this case to the government will "exceed several years of productive services had she been retained. . . ." The Board takes this to be an argument that the appellant should have been counseled and reprimanded rather than removed. This matter was raised to the presiding official. He found the appellant's refusal to report to work at her assigned duty station to be of such a nature that removal was warranted. Initial decision, page 15. The Board finds no error in the interpretation of statute or regulation in this finding.

Accordingly, the petition for review is denied. This is a final decision of the Merit Systems Protection Board on this case. The appellant has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. district court. Either a petition to EEOC or a civil action in a U.S. district court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 22, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEONIE G. MALLORY
AND
GEORGIA R. MALLORY
v.
DEPARTMENT OF THE ARMY

Docket No.
AT035109001

OPINION AND ORDER

On May 30, 1979, pursuant to notice dated March 30, 1979, the appellants were separated by reduction-in-force (RIF) action from their respective positions as Presser, WG-2, at Fort Campbell, Kentucky. On June 20, 1979, the appellants filed separate appeals with the Atlanta Field Office from the RIF actions, and their cases were consolidated for processing because they involved identical issues, namely, that the appellants' work is being performed by part-time, temporary employees, that the appellants were not offered one of the continuing positions and that the RIF was taken in order to prepare for the eventual contracting out of the laundry function. The appellants waived their right to a hearing.

On October 15, 1979, the presiding official issued an initial decision in which he found that, although the RIF was proper, nevertheless, the agency failed, as required by 5 C.F.R. 351.703(a) (1), to offer the appellants positions in the same occupational series and organization, albeit in a separate competitive level, while retaining employees with lower retention standing than appellants. Accordingly, he reversed the agency actions.

The agency's petition for review, filed on November 13, 1979, argues that its interpretation of Federal Personnel Manual (FPM) Chapter 351 has been to consider part-time and intermittent (WAE) employees separately from full-time employees in reductions-in-force, that full-time employees subject to RIF do not want WAE jobs, that the appellants declined offers of reemployment in WAE positions, that OPM's Dallas office gave verbal instructions to the Civilian Personnel Office, Fort Polk, Louisiana, to the effect that full-time employees could not displace part-time employees through RIF procedures, that OPM was in the process of publishing that decision in writing, and that, presumably, WAE employees would fall into this part-time category.

No comments were received from the appellants.

For the reasons noted below, the initial decision of the presiding official is AFFIRMED.

The record shows that the appellants were placed in competitive level WG-02-08, with other permanent WG-7306-2 Pressers, and were in retention category I-B. The agency set up a separate retention register, WG-02-012, for WG-7306 Pressers who were hired on an intermittent WAE basis. Some of these WAE employees retained after the RIF were in group II, subgroups A and B.

Section 351.403 of Title 5, Code of Federal Regulations (CFR) provides:

> (a) Each agency shall establish competitive levels consisting of all positions in a competitive area and in the same grade or occupational level which are sufficiently alike in qualification requirements, duties, responsibilities, pay schedules, and working conditions, so that an agency readily may assign the incumbent of any one position to any of the other positions without changing the terms of his appointment or unduly interrupting the work program. Sex may not be a basis for assigning a position to a competitive level, except for a position for which restriction of certification of eligibles by sex is found justified by the Commission.
>
> (b) Each agency shall establish separate competitive levels for competitive positions as distinguished from excepted positions. Among competitive positions and among excepted positions, each agency shall establish separate competitive levels for positions:
>
> (1) Under different pay schedules;
>
> (2) Filled on a seasonal basis;
>
> (3) Filled on a part-time basis;
>
> (4) Filled on an intermittent basis.
>
> In addition, among excepted positions, each agency shall establish separate competitive levels for positions filled under different appointment authorities.

Accordingly, we find that the presiding official correctly concluded that the WAE employees were properly placed in a competitive level separate from the appellants who were permanent full-time employees.

Section 351.501 of 5 C.F.R. requires agencies to classify competing employees on a retention register who occupy positions in the competitive service in groups and subgroups on the basis of tenure of employment and veteran preference. Group I, to which appellants belong, includes career employees who are not serving a probationary period, while group II includes employees serving a probationary period, career-conditional employees and career employees in obligated positions. Within each group are subgroups, including subgroup A which includes preference eligible employees who have no compensable service-connected disability of 30 percent or more and subgroup B which includes nonpreference eligible employees. The descending order of retention standing by groups is group I, group II, group III, and within each group, in subgroup AD, subgroup A and subgroup B. A further ranking is made within each subgroup beginning with the earliest service date.

Section 351.703 of 5 C.F.R. provides that when an agency selects an employee for release from his competitive level, it must assign him with his consent to a position for which he is qualified which will last at least 3 months, furlough him, or separate him. However, section 351.703(a) provides:

> § 351.703 Assignment involving displacement.
>
> (a) An agency shall assign under § 351.603 a group I or II employee in a position in the competitive service, rather than furlough or separate him, to a position in the competitive service in another competitive level in his competitive area which requires no reduction, or the least possible reduction in representative rate when a position in the other competitive level is held by an employee:
>
> (1) In a lower subgroup; or
>
> (2) With lower retention standing in a position from which the group I or II employee was promoted or an essentially identical position.

As the appellants in this case are in Group I, Subgroup B, and occupied positions in the WG-7306 Presser Occupational Series, they were entitled pursuant to § 351.703(a) to be assigned to positions in another competitive level in the same competitive area, i.e., the competitive level set up for the WAE WG-7306 Pressers, occupied by employees in a lower group (subgroups II-A and II-B).

While the regulations do not authorize or permit an agency to displace a full-time employee by other than a full-time employee (see 5 C.F.R. 351.704(b)(2)), or to provide for the assignment of a less-than-full-time employee to a full-time position (see 5 C.F.R. 351.705(b)(3)), there was at the time of the actions herein no requirement in law or regulation which restricted the assignment under 5 C.F.R. § 351.703 of full-time employees to less-than-full-time positions. This was implicitly acknowledged by OPM in amending 5 C.F.R. 351.704(b) effective July 21, 1980 to restrict such assignments. (45 Fed. Reg. 41627). If the regulations in effect at the time prohibited such assignments under Part 351, as the agency contends, there would have been no need for OPM to amend Part 351 to add such a restriction.

We view the agency's obligation to make such assignment of a full-time employee to a less-than-full-time position to arise only in those situations, as in the instant case, where there are no full-time permanent positions to which the full-time employee can be assigned in lieu of a reduction in force.

In its petition the agency argues that its interpretation of FPM Chapter 351-A-lb. (g) in Appendix A is that full-time employees may not displace part-time and WAE employees. That provision states:

> When the employee is not serving on a regular full-time basis, the record should show the basis on which he is employed; that is, seasonal, part-time, or intermittent. This is needed because such groups are considered separately, in reductions in force. They do not compete with full-time employees or with each other.

Although the FPM provision is only guidance, and may not serve to contravene the requirements set forth in the published regulation, nevertheless, Appendix A in which the provision appears relates to retention records which the agency is required to maintain, rather than assignment rights of employees. Moreover, while the agency indicates in its petition that offers for WAE positions were declined by the appellants, the agency admits that those offers were made subsequent to the RIF action, and the record is insufficient to indicate whether the positions offered satisfied the regulatory requirements. Nor do oral instructions transmitted by OPM personnel to an agency constitute "regulations" governing agency actions in disposing of employee rights under Part 351. As previously noted, the very fact that OPM recently amended its regulations to produce the result for which the agency here contends is a strong indication that such result was not required by the regulations existing at the time of the actions herein.

Accordingly, the agency's petition for review is GRANTED, and upon reopening, the Board hereby AFFIRMS the initial decision of the presiding official dated October 15, 1979.

This is a final decision of the Merit Systems Protection Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 22, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RHONDA G. OTT
v.
DEPARTMENT OF THE NAVY

Docket No.
SE315H99003

OPINION AND ORDER

The appellant was terminated during her probationary period by the Navy. She appealed on the merits to the Board's Seattle Field Office, and the presiding official dismissed the appeal as being outside the purview of the Board's appellate jurisdiction. The presiding official found that appellant had no right to appeal the action to the Board, as the appeal was based upon post-appointment factors unrelated to allegations of discrimination due to partisan political reasons or marital status.

The petition for review also addressed the merits of the termination, presented certain information regarding the physical environment in which appellant had worked, and offered new and material evidence indicating that appellant had been pregnant when she was terminated. The agency contends in response that appellant has no avenue of appeal to the Board.

The Board's regulations provide that a petition for review may be granted when the petitioning party submits written argument and supporting documentation meeting certain criteria, one of which is the tender of new and material evidence. The evidence offered, however, does not address the basis for the initial decision, that appellant, as a probationer who does not allege that her termination was due to her marital status or to partisan political reasons, has no right of appeal to the Board. Rather, the evidence deals with appellant's pregnancy during the period of time which the agency used to evaluate her performance and conduct, and is not material to the question of whether appellant may appeal her termination.

As a probationary employee, the appellant has no statutory right of appeal to the Board. See 5 U.S.C. 7511(a)(1). The only regulatory right of appeal from terminations during probation for post-appointment reasons must involve an allegation of discrimination based upon partisan political reasons or marital status. 5 C.F.R. 315.806. As these allegations were not made to the presiding official, he correctly concluded that the Board had no jurisdiction over the instant appeal. Moreover, the Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076, makes clear that discrimination on the basis of pregnancy, childbirth, or related medical conditions constitutes unlawful *sex* discrimination under Title VII of the Civil Rights Act of 1964, as amended. An allegation of discrimination because of pregnancy must, therefore, be considered to constitute an allegation of sex discrimination. Such an allegation by a probationary employee, standing alone, may not be adjudicated by the Board. Therefore, the petition does not meet the Board's regulatory criteria for review.

Accordingly, the petition for review is DENIED. This is a final decision of the Merit Systems Protection Board. The appellant is hereby notified of her right to appeal this decision in the appropriate circuit of the U. S. Court of Appeals or the Court of Claims, provided that such appeal is filed within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 22, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HERBERT J. PEDERSEN
v.
DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE

Docket No.
CH531D99008

OPINION AND ORDER

The appellant, employed with the Social Security Administration as a GS-10, Social Insurance Representative, received a negative determination on March 28, 1979, to withhold his within-grade salary increase to step 9, for failure to meet an acceptable level of competence. He pursued a request for reconsideration by a higher-level agency official, who sustained the negative determination by a reconsideration decision issued June 5, 1979.

The appellant thereafter pursued his right of appeal to the Board's Chicago Field Office. As the primary contention, his appeal alleged that the agency had violated merit system principles and thereby engaged in a prohibited personnel practice under the Civil Service Reform Act of 1978, by denying his step increase without having established a performance appraisal system as required by 5 U.S.C. section 4302, or complying with the provisions for actions based on unacceptable performance under 5 U.S.C. section 4303.

The Board has addressed the issues raised in the instant appeal in its decision, *William E. Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). In that case, we found that acceptable level of competence (ALOC) determinations are made under 5 U.S.C. 5335 and not under section 4303. (At 501). We found that while 5 C.F.R. 430.203(i) specifically includes negative ALOC determinations among the personnel actions which agencies must base upon section 4302 performance appraisals, (*Id.*, at 502), the connection of ALOC determinations to performance appraisals is to be effective only upon the agency's establishment of section 4302 appraisal systems. (*Id.*, at 505). Agencies are not precluded from making ALOC determinations in the post-Reform Act, pre-appraisal system period (*Id.*, at 505); and during that interim period, the provisions of 5 U.S.C. 5335(a) and 5 C.F.R. 531.407 are applicable.

The presiding official found that the action of the agency in withholding appellant's within-grade increase was supported by a preponderance of the evidence. We held in *Parker, supra,* that appeals to the Board under 5 U.S.C. 5335(c) fall within section 7701(c)(1)(A) rather than (B) (*Id.,* at 502), which section requires proof by the lesser evidentiary standard of "substantial evidence." No prejudice resulted to appellant by the presiding official's application of the higher standard of evidence to the agency's proof.

The Board finds that the presiding official properly determined that the action under appeal was subject to the provisions of 5 U.S.C. 5335 and 5 C.F.R. 531.407, and that no violation of 5 U.S.C. 4302 or 4303 had occurred in the withholding action. Thus, the Board does not find that the initial decision was based upon an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115 (b).

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board in this case. The appellant is informed of his right to seek judicial review of this decision in the appropriate circuit of the U.S. Court of Appeals or the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 22, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD E. SPATZ
v.
DEPARTMENT OF HEALTH, EDUCATION,
AND WELFARE

Docket No.
CH531D99006

OPINION AND ORDER

The appellant's within-grade salary increase was withheld by his employing agency, the Social Security Administration, Chicago, Illinois. He appealed to the Board's Chicago Field Office. The initial decision sustained the withholding action. In his petition for review, the appellant contends that the presiding official did not properly interpret the Civil Service Reform Act of 1978. In its response, the agency contends that the presiding official correctly interpreted those portions of the Reform Act which were material to the case.

As was asserted on appeal, the appellant contends that the agency did not comply with 5 U.S.C. 4302 and 4303 in the withholding action and that the Reform Act was thus violated and prohibited personnel practices occurred.

The Board has addressed the issues raised in the instant appeal in its decision, *William E. Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). In that case, we found that acceptable level of competence (ALOC) determinations are made under 5 U.S.C. 5335 and not under section 4303 (at 18). We found that while 5 C.F.R. 430.203(i) specifically includes negative ALOC determinations among the personnel actions which agencies must base upon section 4302 performance appraisals, (*Id.*, at 502), the connection of ALOC determinations to performance appraisals is to be effective only upon an agency's establishment of a section 4302 appraisal system. (*Id.*, at 505). Agencies are not precluded from making ALOC determinations in the post-Reform Act, pre-appraisal system period (*Id.*, at 505); and during that interim period, the provisions of 5 U.S.C. 5335(a) and 5 C.F.R. 531.407 are applicable.

The presiding official found that as appellant had not asserted that he was performing at an acceptable level of competence, the action of the agency in witholding his within-grade increase was supported by a preponderance of the evidence. We held in *Parker*, *supra*, that appeals to the Board under 5 U.S.C. 5335(c) fall within section 7701(c)(1)(A) rather than (B) (*Id.*, at 502), which section requires proof by the lesser evidentiary standard of "substantial evidence." No prejudice resulted to appellant by the presiding official's application of the higher standard of evidence to the agency's proof.

The Board finds that the presiding official properly determined that the action under appeal was subject to the provisions of 5 U.S.C. 5335 and 5 C.F.R. 531.407, and that no violation of 5 U.S.C. 4302 or 4303 had occurred in the withholding action. Thus, the Board does not find that the initial decision was based upon an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115 (b).

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board in this case. The appellant is informed of his right to seek judicial review of this decision in the appropriate circuit of the U.S. Court of Appeals or the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 22, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ZELDER COACHMAN
v.
INTERNAL REVENUE SERVICE

Docket No.
PH043209001

ORDER

Appellant was removed from her position with the agency for unsatisfactory performance. In the initial decision of December 10, 1979, the presiding official found that the removal was supported by substantial evidence and affirmed the action under 5 U.S.C. Chapter 43. Appellant filed a timely petition for review pursuant to 5 C.F.R. 1201.115 (1979).

On December 17, 1979, the Board issued its decision in *Wells* v. *Harris*, 1 MSPB 199 (1979). This case is now REMANDED to the field office for reconsideration in light of that decision. The presiding official shall provide copies of the *Wells* decision to the parties.

In conjunction with this reconsideration, the presiding official shall provide the agency twenty (20) days in which to elect to proceed under the standards of 5 U.S.C. Chapter 75. If the agency makes such election, the presiding official shall provide the parties a reasonable time to present documentary or testimonial evidence concerning the merits of the appeal, including the issue of whether, by a preponderance of the evidence, the agency action was taken for "such cause as will promote the efficiency of the service." The presiding official shall then issue a new adjudication under the standards of Chapter 75. If the agency does not elect to request reconsideration under the standards of Chapter 75, the agency action shall be reversed as not authorized by 5 U.S.C. 4303.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *August 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANK GIRESI
v.
U.S. DEPARTMENT OF THE INTERIOR,
NATIONAL PARK SERVICE

Docket No.
DC752S99011

OPINION AND ORDER

A petition was filed requesting the Board to review the September 28, 1979 initial decision of the presiding official. In that decision, he dismissed the appeal of Mr. Frank Giresi, a U.S. Park Police Officer, from a 14 day suspension because no right of appeal to the Board from such short suspension action is provided under the Civil Service Reform Act of 1978 (92 Stat. 1111, Pub. L. No. 95-454 (1978)).

The petition for review contends that the initial decision is based on an erroneous interpretation of law because the so-called savings clause of the Reform Act (Section 902(b) is applicable in that the administrative proceedings which culminated in his suspension had been pending for several months before the Reform Act became effective, January 11, 1979.

The agency did not respond to the petition for review.

The savings clause, which governs the Board's processing of cases instituted before the effective date of the Reform Act, provides:

> No provision of this Act shall affect any administrative proceedings pending at any time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

The Board promulgated regulations construing the savings clause:

> No provision of the Civil Service Reform Act shall be applied by the Board in such a way as to affect any administrative proceeding pending at the effective date of such provision. "Pending" is considered to encompass existing agency proceedings, and appeals before the Board or its predecessor agencies, that were subject to judicial review or under judicial review on January 11, 1979, the date on which the Act became effective. *An agency proceeding is considered to exist once the employee has received notice of the proposed action.*
>
> 44 Fed. Reg. 38349, 38360-61 (1979), 5 C.F.R. Section 1201.191(b) (1979). (emphasis added)

Since the record indicates that the notice of proposed suspension was issued May 3, 1979, the proposed personnel action against the petitioner was initiated after the effective date of the Reform Act. Because "an agency proceeding" is considered not to exist before "the employee has received notice of the proposed action," it is immaterial that the U.S. Park Police, National Park Service, was investigating the case and considering whether and what penalty to propose prior to the actual commencement of the suspension action by the issuance of the notice of proposed personnel action.

The Board's regulation has been held valid. *Kyle v. Interstate Commerce Commission,* 609 F.2d 540 (D.C. Cir. 1979); *Gingrich v. Veterans Administration,* No. 79-2879 (5th Cir. October 18, 1979); *In re Earl Christian,* 606 F.2d 822 (8th Cir. 1979); *Gaskins v. United States Postal Service,* No. 5-79, slip op. (Ct Cl. October 23, 1979); *Glenn v. M.S.P.B.,* 616 F.2d 270 (6th Cir. 1980).

Accordingly, the petition for review is DENIED. This is the final decision of the Merit Systems Protection Board in this case.

The petitioner may file a civil action in the United States Court of Claims or in an appropriate circuit of the United States Court of Appeals no later than 30 days from receipt of this Opinion and Order.

For the Board:

ROBERT E. TAYLOR
Secretary.

Washington, D.C., *August 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

STEWART H. PRINCE
v.
DEPARTMENT OF THE NAVY

Docket No.
DC075209101

ORDER

This appeal is REOPENED, VACATED AND REMANDED. Appellant is a Motor Vehicle Operator who was given a thirty day suspension for unauthorized use of a Government vehicle and for unauthorized absence. Appellant raised as one of his defenses that the charges were made in reprisal for filing discrimination complaints.

Appellant's claim of reprisal constitutes both an allegation of prohibited personnel practice under 5 U.S.C. Section 2302(b) (9) and an allegation of a violation of EEO laws, see 29 CFR 1613.261 (1979). To establish a violation of these authorities, the appellant must demonstrate that he was engaged in activity protected by the appropriate section, that he was subsequently treated in adverse fashion by the employer, and that there is a causal connection between the protected activity and the adverse action. If retaliation is shown, then a violation of these authorities is found if the retaliation was a significant factor in the challenged personnel action. *In re Frazier, et al.*, 1 MSPB 159 (1979).

The presiding official did not analyze appellant's appeal as set forth above; he stated only that the "complaints . . . were not shown to be connected to this present case." The presiding official should have made findings on whether the appellant's failure of proof was a failure to show a "causal connection" and any other findings appropriate to the analysis.

Whenever an appeal raises issues of discrimination under 5 U.S.C. 7702 such as are raised in this appeal, an appellant should be advised of his/her right under 5 U.S.C. 7702(b) (1) to petition the Equal Employment Opportunity Commission to consider the Board's decision and of his/her right under Section U.S.C. 2000e-16 to a trial *de novo* in United States District Court on the discrimination issues. Appellant was not so advised.

Accordingly, this case is REOPENED, VACATED and REMANDED to the presiding official for further proceedings consistent with this opinion.

For the Board:

ERSA H. POSTON.

Washington, D.C., *August 26,1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RAYMOND W. BRADFORD
v.
DEPARTMENT OF THE ARMY

Docket No.
PH075209062

OPINION AND ORDER

Appellant appealed from the agency's action in denying his application for back pay. Appellant claimed that he was entitled to back pay when his position description was changed to reflect his direct supervisory duties. Although appellant was given a special adjustment in pay effective April 22, 1979, in accordance with 5 C.F.R. 531.301, he argued that an award of back pay should have been granted from the time he assumed his position of direct supervisory authority.

In the initial decision, the presiding official dismissed the appeal for failure to come within the Board's appellate jurisdiction. Specifically, the presiding official stated, "There is no law, rule or regulation that grants a right of appeal to the Board from an agency action denying a claim for back pay as presented in the instant appeal."

In appellant's petition for review, he neither states that the presiding official erred in interpreting relevant law, nor does he cite new and material evidence that would call into question the propriety of the initial decision. Appellant's petition merely argues that an employee of the Air Force, Mrs. Dorothy R. Greathouse, was awarded back pay by her agency.

The Board finds the fact that another employee was granted back pay following a grievance to be irrelevant to this case. The Board's jurisdiction is not dictated by Federal agencies and is not coextensive with their authority under grievance systems. Rather, the adverse actions over which this Board has appellate jurisdiction are specifically enumerated in 5 U.S.C. 7512. An agency denial of back pay is not one of the actions so listed.

Back pay issues are generally to be resolved between the individual employee and his agency. However, where the employee cannot resolve this issue with his agency, 31 U.S.C. 71 dictates that the dispute be settled in the General Accounting Office.

Upon review of appellant's petition, therefore, the Board finds that it has not met any of the criteria for review set forth in 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 28, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM TROWELL
v.
U.S. POSTAL SERVICE

Docket No.
NY075209016

OPINION AND ORDER

The Board reopened this appeal in order to consider the propriety of an award of fees to the appellant's attorney by the Board's New York Field Office.[1] The agency and the Office of Personnel Management (OPM) have submitted briefs asserting that the award was erroneously made on the sole basis that the agency's presentation of its case before the Board's presiding official was negligent.

In his initial decision, the presiding official reversed the agency's dismissal of the appellant, based on a charge of intoxication by alcohol while on duty, finding in his initial decision that the agency failed to support the charge with *any* evidence. Initial Decision at 2. In response to the appellant's subsequent unopposed motion for attorney fees, the presiding official found an award of fees to be warranted in the interest of justice, reasoning:

> Attorney's fees can be awarded whenever an agency proceeds (in the proposing, deciding, or prosecuting stage) with an action and there is ill will and/or negligence on the part of some agency officials which exists to such a degree as to unconscionably taint the entire proceeding. . . .[2]
>
> I hereby find that this case falls within the above-described standard. The one . . . charge brought against appellant was found not sustained and (the agency representative's) apparent unfamiliarity with prosecuting an appeal amounted to negligence. This negligence clearly existed to such a degree as to unconscionably taint the entire proceeding.

Addendum Decision at 3. The agency and OPM contended in their briefs that this conclusion is erroneous because an award of attorney fees cannot be "warranted in the interest of justice" under 5 U.S.C. 7701(g) (1) simply because the agency's presentation of its case before the Board was negligent.

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[1] Order dated January 18, 1980.

[2] *See O'Donnell v. Department of the Interior,* 2 MSPB 604, 608 (1980).

We find to the contrary. As held in *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980), the interest of justice may warrant an award of attorney fees in cases where the agency knew or should have known that it would not prevail on the merits when it brought the proceeding. This category of cases may include instances where the agency presented its case so negligently that the action could not possibly be sustained on the record established before the Board.[8] We concur with the presiding official's judgment that this appeal represents such a case. We note, further, that the failure to present *any* evidence relating to the charge on which the adverse action is based borders on bad faith in the conduct of the proceeding, which would also warrant an award of fees. *Allen, supra*, at 592 *cf. Roadway Express, Inc. v. Piper*, 48 U.S.L.W. 4836, 4840 (June 23, 1980).

Representation of a party in an adverse action appeal before the Board requires familiarity with a complex body of statutes, regulations, and case law, in addition to knowledge of the Board's procedures and skill in the presentation of evidence and examination of witnesses. The Board's statutory function is "adjudication," 5 U.S.C. Section 1205(a)(1), and its final decisions are reviewable directly by the federal appellate courts, bypassing de novo review in the district courts in all but discrimination cases, 5 U.S.C. Section 7703(b). Congress has accordingly provided a much more judicial character for the Board's proceedings than was required for pre-Reform Act proceedings before the former Civil Service Commission. The appellant now has in all cases a statutory right to an evidentiary hearing, a transcript, and representation by counsel. 5 U.S.C. Section 7701(a). Extensive discovery rights akin to those of litigants in federal court are now available, and the Board is also now authorized to issue subpoenas for witnesses and documents. 5 U.S.C. Section 1205(b). Moreover, Congress has expressly placed upon agencies the burden of proving their cases before the Board. 5 U.S.C. Section 7701(c). In these circumstances, "the proper functioning of our adjudicative system, whether in court or in administrative proceedings, depends upon the sharp focus of factual and legal issues which takes place through the full participation of the parties in the adversarial process." *In the Matter of Robert J. Tariela*, 1 MSPB 116 (1979) (concurring opinion at 124). Competent representation of the parties in such adjudication is not only to their advantage, it also "serves the interests of justice by providing the adjudicative body with a more fully enlightened perspective from which to render its decision," thereby serving "the public interest in decreasing the likelihood that an adjudication may go askew through failure to consider important aspects of the case." *Id.* at 123, 125.

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[8] *Allen, supra*, at 593 n. 37.

This may not require agencies to be represented by counsel in proceedings before the Board, but surely it does not permit the assignment of totally unskilled, inexperienced, and unprepared agency representatives who are utterly lacking in familiarity with the essentials of presenting the agency's case before the Board. The consequence of such unqualified representation is all too foreseeable—an incompetent presentation of the case which makes reversal of the agency's decision virtually inevitable on the record established before the Board, and which thus has the effect of rendering the entire proceeding an unnecessary burden, if not a de facto form of mere harassment, for the appellant. If an agency is not prepared to take a removal action seriously enough to present its case with at least a minimal degree of competence, then in the interest of justice to all concerned it should not initiate the action to begin with. The interest of justice does not warrant the imposition on appellants of the legal costs of such an unnecessary and unjustified burden.

After properly concluding that fees should be awarded in this appeal, the presiding official considered the reasonableness of the $1,725.00 in fees and $10.00 in costs claimed in the affidavit of the appellant's attorney:

> As Exhibit "A" to his affidavit, Mr. Lenoir (the appellant's attorney) delineates what I find to be a cogent statement of the time spent and charges assessed in this case. It reflects an obviously careful documentation in accordance with accepted business, i.e., legal business, standards as I know them. Mr. Lenoir's total time spent, 34½ hours, and his hourly rate of $50 are both found not to be excessive. Mr. Lenoir is found to have efficiently used his time in this case in researching appropriate issues, law, and regulations. Also, a rate of $50/hour in New York City is extremely reasonable for an attorney of Mr. Lenoir's expertise. In addition, a cited cost of $10 for messenger services is found to be reasonable. . . .
>
> In making the above findings, I have referred to the American Bar Association's twelve guidelines delineated in the ABA's Code of Professional Responsibility, Ethical Consideration 2-18, Disciplinary Rule 2-106.

Addendum Decision at 3-4. Thus determining that the fees and costs claimed were reasonable, the presiding official awarded a total of $1,735.00 to the appellant's attorney.

We find that this analysis of the reasonableness of the attorney fees claimed is adequate to support the presiding official's determination that those fees should be awarded. While a more thorough analysis would have been desirable in light of the guidelines set forth in *Kling v. Department of Justice,* 2 MSPB 620 (1980), the presiding official did not have the benefit of those guidelines when making his determination. In any event, the same result would undoubtedly have followed.

Accordingly, we AFFIRM the presiding official's addendum decision awarding fees to the appellant's attorney. The agency is hereby ORDERED to furnish the New York Field Office a certified statement that $1,735.00 has been remitted to the appellant's attorney within ten calendar days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *August 29, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DEAN A. THOMAS
v.
VETERANS ADMINISTRATION

Docket No.
AT315H09005

OPINION AND ORDER

Petitioner was terminated by the Veterans Administration during the probationary period of his career-conditional appointment. His appeal to the Atlanta Field Office of the Board was dismissed for lack of jurisdiction. The presiding official based his decision on the ground that petitioner, as a probationary employee serving under an initial appointment, was limited only to the appeal right to the Board conferred by that portion of 5 C.F.R. 315.806 not inconsistent with the Civil Service Reform Act. The applicable part, subsection 315.806(b), provides for such right of appeal where it is alleged that termination was based upon discrimination due to partisan political reasons or marital status. Since petitioner failed to so allege, the presiding official concluded that the Board lacked jurisdiction to entertain the appeal.

On review, petitioner denied that he was serving under an initial appointment when terminated, alleging that he had previously served from February 1974 to August 1974 with the U.S. Department of Transportation in Washington, D.C. and that he was therefore entitled to all the statutory procedural rights afforded by 5 U.S.C. 7511 *et seq*. The agency took issue with petitioner's assertion, contending that, at the time of termination, petitioner was serving under a career-conditional appointment subject to a one-year probationary period and that, additionally, petitioner had failed to complete his probationary period with the Department of Transportation.

Petitioner's allegation that he had completed his probationary period at the time of his termination from the Veterans Administration is without merit. As evidenced by the Veterans Administration Personnel Action form (VA Form 5—4650), petitioner received, effective April 4, 1979, a career-conditional appointment from a civil service register and was therefore required to serve a full one-year probationary period under his new appointment.

5 C.F.R. 315.801(a)(1). Since petitioner was terminated effective August 24, 1979, his probationary period was never completed.[1]

Under 5 U.S.C. 7511(a), probationary employees are specifically excluded from those classes of persons entitled to appeal removal actions to the Board. Hence, petitioner, as a probationary employee, has no statutory right to appeal his termination to the Board.

However, under section 315.806 of Title 5 of the Code of Federal Regulations, a limited right of appeal to the Board is conferred upon probationary employees. Specifically, section 315.806(b) provides for a right of appeal upon the allegation that termination was based on partisan political reasons or marital status, and section 315.806(c) confers a right of appeal based upon the allegation that a termination for a preappointment condition was not effected pursuant to section 315.805. None of the foregoing allegations have been made by petitioner. Therefore, the Field Office was without jurisdiction to entertain the appeal, as the presiding official properly decided. Hence, for this and all the foregoing reasons, the petition does not meet the criteria for review set forth in 5 C.F.R. 1201.115.

Accordingly, the petitione for review is hereby DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the United States Court of Appeals or the United States Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 2, 1980*

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[1] Furthermore, even if petitioner were permitted to add his six months of service with the Department of Transportation to his four months of service with the Veterans Administration, he would have completed only ten months of the required one-year probationary period.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Lois A. Quinney
v.
Department of the Army

Docket No.
SF075299015

Opinion and Order

I. FACTUAL BACKGROUND

On September 11, 1977, Mr. Donald H. Miller was selected for promotion to a GS-7 position. Thereafter appellant, one of seven candidates for that position, filed a complaint with the agency alleging discrimination on the bases of race and sex (Black female) in her nonselection to the position. As a result of an investigation, the Commander, HQ Presidio of San Francisco, accepted the report of the U.S. Army Civilian Appellate Review Agency (USACARA) that Miller's selection was based on factors other than merit constituting discrimination against appellant, and directed that she be promoted to Supervisory Military Personnel Technician, GS-7, retroactive to the date Miller was promoted.

To accomplish the above action, Miller was issued an advance notice proposing his change to lower grade from GS-7 to Administrative Supervisor, GS-6, the position which was to be vacated upon appellant's retroactive promotion to the GS-7 position. Thus, Miller was demoted, and he appealed to the San Francisco Field Office of the former Federal Employee Appeals Authority.

By decision issued September 19, 1978, the Field Office found that the agency failed to support by a preponderance of the evidence that Miller's promotion was based on race and/or sex discrimination. The decision stated that both appellant and Miller were among the best qualified candidates and under the former Civil Service Commission's regulations (FPM ch. 335, Subch. 3-7(c) (October 15, 1975)) either could have been selected based on the selecting official's reasonable evaluation of who could best perform the particular job in question. Accordingly, the agency action whereby Miller was changed to lower grade was reversed and the Field Office recommended that the agency cancel that demotion action.

In order to effect the cancellation of Miller's demotion, the agency demoted appellant by adverse action procedures to the GS-6 position she occupied prior to her retroactive promotion. She appealed this adverse action to the Merit Systems Protection Board's San Francisco Field Office, which issued an initial decision dated May 10, 1979. The presiding official found that the evidence supported the agency's position that it was compelled to assign appellant from the specific GS-7 position so that Miller might be returned to it. He further found, however, that the record was devoid of any evidence that the agency was precluded from taking some less severe action than demotion, noting that it was within the agency's discretion to take alternative action and to give good faith consideration thereto, and that the agency should have provided evidence that it had done so.

Accordingly, the presiding official found that the agency failed to carry its statutorily imposed burden to support by a preponderance of the evidence its decision to reduce appellant from the GS-7 level, and directed the agency to cancel the appellant's change to lower grade. It is this decision which is before the Board in the present petition.

II. ISSUES

By Order dated June 12, 1979, the Board reopened the case and directed the parties to file briefs on whether an adverse action occurred when the appellant was reduced to a GS-6 from a GS-7, and whether it is relevant that the agency allegedly failed to take steps to maintain the appellant at a higher grade. Briefs on these issues have been filed by the agency and by the Office of Personnel Management (OPM) as an intervenor. The Board has not received a response from the appellant.

III. DISCUSSION

In its brief, the agency asserted that appellant's demotion from the GS-7 position was an action required by facts which left the administrative officer no choice and did not constitute an adverse action as defined in FPM 752, Subch. 1-1(b)(4) (December 21, 1976). The agency contended that it is irrelevant that it allegedly failed to take steps to maintain appellant at the higher grade of GS-7. Moreover, the agency maintained that it did consider alternative actions before deciding to effect the change to lower grade.

OPM argued that when appellant prevailed in her EEO complaint, she was entitled to the GS-7 position, and that when Miller prevailed in his subsequent adverse action appeal, he was entitled only to a position of like grade and pay rather than restoration to the same position he held initially. OPM contended that appellant's demotion and appeal could and should have been avoided.

With regard to whether an adverse action occurred when appellant was demoted from GS-7 to GS-6 under the above situation, there is no question that a reduction in grade or pay is an action appealable to the Board under 5 U.S.C. 7512 and 7513.

In accordance with 5 U.S.C. 7511(a)(1)(A), those entitled to appeal such an action include:

> An individual in the competitive service who is not serving a probationary or trial period under an initial appointment or who has completed one year of current continuous employment under other than a temporary appointment limited to one year or less. . . .

Thus, since appellant was a non-probationary career employee in the competitive service and was reduced in grade and pay, she was entitled to appeal the demotion action to the Board. The Board finds that an adverse action occurred, and her timely appeal falls within the purview of 5 C.F.R. 1201.01 *et seq.*

5 U.S.C. 7513 provides that an agency may take an action against an employee "only for such cause as will promote the efficiency of the service". The Board finds that the agency failed to establish by a preponderance of the evidence that appellant's change to lower grade will promote the efficiency of the service.

The recommendation of FEAA that the agency cancel the personnel action demoting Miller does not appear to justify appellant's demotion, particularly in light of the previous determination of the agency in appellant's discrimination complaint. The phrase "such cause as will promote the efficiency of the service" as a standard of job protection does not authorize a demotion of an employee simply because an agency selected a particular course of action to implement the cancellation of another employee's personnel action. The agency in this case has not shown a reasonable connection between appellant's holding the GS-7 position and the need for the agency to cancel Miller's demotion. Essentially, the agency was in a situation where it had two employees required to be in GS-7 positions. Under such a circumstance, the agency had the responsibility of treating both fairly, through the exercise of discretion in making assignments.

Implicit in the agency responsibility was the obligation to place both appellant and Miller in positions without affecting either of them adversely. In short, there were other proper ways for the agency to proceed in the situation such as the one at hand and we cannot find that the method used in this case was a proper one.

In every adverse action it is essential that there be a "cause" that will promote the efficiency of the service. 5 U.S.C. 7513(a). Review of this record by the Board reveals that no valid "cause" existed in the absence of a showing that there was a violation of an obligation or duty on the part of appellant. In the instant case appellant was not charged with a wrongful action in her performance or conduct. The agency specifically stated that its action to demote appellant from her GS-7 position was in order to effect the required cancellation of Miller's change to lower grade. The fact of Miller's appeal and the FEAA recommended corrective action did not establish that appellant's demotion was "for such cause as will promote the efficiency of the service".

In consideration of the above, we find that as a result of the agency's EEO determination, appellant was entitled to a GS-7 position notwithstanding Miller's later successful appeal to FEAA. The agency has to determine where the two employees should be assigned. The dilemma facing the agency as to which of the two employees receives the specific GS-7 position will not be settled by the Board. The resolution of this problem is the responsibility of agency management, along with planning the work program and organizing the work force to accomplish agency objectives.

IV. CONCLUSION

Under the above circumstances, the Board finds that an adverse action occurred when appellant was reduced in grade, and that appellant's change to lower grade, after prevailing in her EEO action, did not promote the efficiency of the service.

Accordingly, it is ordered that the decision of the presiding official to reverse the action be AFFIRMED, and the Board directs that appellant's change to lower grade be cancelled. The agency is to furnish evidence of compliance with the Opinion and Order to the Board's San Francisco Field Office within 5 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 2,1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CANDYCE BECKLUND
v.
DEPARTMENT OF THE ARMY

Docket No.
SF075209046

OPINION AND ORDER

On August 6, 1979, the appellant *pro se* filed a petition for appeal with the Board's San Francisco Field Office in which she alleged that her optional retirement, effective June 21, 1979, from the position of Housing Project Manager, GS-1173-07, with the Sacramento Army Depot, Department of the Army, Sacramento, California, was involuntary and the product of duress and deception by the agency. The appellant did not request a hearing. After notice to the parties of the close of the record on October 20, 1979, the presiding official issued his initial decision dated December 4, 1979.

The record reflects that the appellant was reassigned by the agency from Washington, D.C., to Sacramento, California, effective July 16, 1978. On December 28, 1978, the appellant requested and was granted 90 days' leave without pay by her supervisor, beginning January 2, 1979, in order to seek medical attention and reassignment to the Washington, D.C., area. The appellant moved to McLean, Virginia, where she purchased a house. On March 27, 1979, the appellant telephoned her supervisor and requested an additional 90 days' leave without pay. She also submitted a written request for the additional leave dated March 28, 1979, in which she stated, "At the end of 90 days if I do not have a position I will retire from the Federal Government." In a letter dated April 13, 1979, the appellant's supervisor granted her an additional 30 days of leave without pay and informed her that she would be charged with absence without official leave if she did not return to work by April 30, 1979.

By application dated and signed April 28, 1979, the appellant requested an additional 4 days' sick leave from May 1 through 4, 1979, a request which the agency subsequently granted. The appellant stated on her application "RETIREMENT PAPERS FOLLOWING." She subsequently executed an application for disability retirement dated April 29, 1979, on the basis of a heart condition and an allergy condition.

The appellant was advised by agency personnel in May 1979, that her retirement benefits would be the same whether she applied for disability retirement or optional retirement. On June 11, 1979, she submitted an undated application for optional retirement to the agency. The appellant did not return to her job and by notice dated June 13, 1979, received by the appellant on June 16, 1979, she was informed of her proposed removal on the charge of absence without leave from May 7, 1979. The appellant conferred with the agency by telephone on June 21, 1979, and requested that her retirement be made effective that day. The agency accepted her request and her retirement was effected immediately. By letter dated July 9, 1979, the agency informed the appellant that no further steps would be taken to effect her removal in view of her retirement.

Citing specific portions of the record as bases for his conclusions, the presiding official found that the appellant's absence without leave formed the basis for the agency's proposed removal action, that she voluntarily selected her own course of conduct, and that her proposed removal was not arbitrary or unreasonable because her absence without leave provided an actionable basis for the proposal. He also found not persuasive the appellant's assertion that her mental and physical health affected her capacity to decide voluntarily to retire. Finding further that the evidence did not establish coercion or deceit by the agency and that the appellant's retirement was voluntary, the presiding official dismissed her appeal as not within the purview of the Board.

On December 26, 1979, the appellant *pro se* timely filed with the Board a copy of the presiding official's initial decision on which she penned additional explanations of events and criticisms of the findings of fact. The Board construes the appellant's submission to constitute her petition for review. The thrust of the appellant's argument is that she was allegedly pressured by the agency's proposed removal action into resigning and that she had intended to return to her job and had informed the agency of her intention. The agency's response, filed on February 1, 1980, asserted that the appellant had stated her intention to resign orally and in writing on several occasions prior to the proposed removal action, and that the proposed action did not pressure her into retiring.

The appellant's objections to the initial decision are not supported by references to applicable laws or regulations, or with specific reference to the record. 5 C.F.R. 1201.115. Nor does her petition establish that new and material evidence is available that, despite due diligence, was not available when the record was closed, or that the decision of the presiding official is based on an erroneous interpretation of statute or regulation. *Id.* The appellant's petition does not explain persuasively why the presiding official's factual determination is incorrect; nor does it identify specific evidence in the record which demonstrates such error. *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980).

Accordingly, the petition for review of the initial decision of the presiding official is DENIED for failure to meet the Board's regulatory criteria for review.

This is the final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 3, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ANDREW K. HOLT v. DEPARTMENT OF THE TREASURY UNITED STATES CUSTOMS SERVICE	Docket No. DA075209031

OPINION AND ORDER

Appellant, a preference eligible, received an indefinite, intermittent, excepted appointment, effective March 22, 1976. His appointment was made under authority of 5 C.F.R. 213.3105 (b) (5) (1976) and was not to exceed 700 hours in any service year. During the service year 1976, appellant worked at various times, as assigned, until he completed the maximum hours allowable on December 14, 1976, after which he was not recalled to duty. Appellant's employment was officially terminated effective April 11, 1979, for allegedly unacceptable performance and attitude. Thereafter, by petition filed July 18, 1979, appellant sought to appeal the matter to the Board's Dallas Field Office. However, by initial decision issued on October 24, 1979, the presiding official found that whereas appellant had a Schedule A excepted appointment and was in a pay status for a total of only approximately 87½ days, he did not meet the required "one year of current continuous employment" which would have entitled him to appeal the separation to the Board. 5 U.S.C. 7511 (a) (1) ; 5 C.F.R. 752.401. Accordingly, the appeal was dismissed as not within the Board's appellate jurisdiction.

In his timely petition for review, appellant states: "I do not believe any sensible person would agree that a personnel action taken 2 years, 3 months and 27 days after the last duty day could be for the reasons stated." The balance of appellant's petition is similarly directed at disputing the reasons proffered by the agency for the termination action. Appellant makes no attempt to address the basis for the initial decision, i.e., that the Board lacks the statutory and regulatory authority to entertain his appeal. In its response to the petition, the agency argues that since appellant has submitted no new evidence, or documentation that would show that the presiding official's decision was based on an erroneous interpretation of statute or regulation, the initial decision must stand.

5 C.F.R. 1201.115 provides that the Board may grant a petition for review when the requesting party meets certain criteria. The initial decision in this case informed appellant, in detail, of the criteria for filing such a petition. Nonetheless, the instant petition neither cites any of the required criteria, nor presents argument or documentation tending to meet any criterion for review. Specifically, the Board finds no showing of new and material evidence that, despite due diligence, was not available when the record was closed; and no showing that the decision of the presiding official was based on an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115. The Board finds, moreover, that as appellant held an excepted appointment and had not completed one year of current continuous service, the presiding official correctly concluded that he had no standing to appeal his termination from employment to the Board. 5 U.S.C. 7511(a)(1) and 4303(f)(3).

The appellant's petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is advised that he may seek judicial review of the Board's final decision in an appropriate circuit of the U.S. Court of Appeals or in the Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FRANK J. SANCHEZ
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DE075209009

OPINION AND ORDER

This appeal was filed with the Denver Field Office of the Merit Systems Protection Board, based upon appellant's objection to his removal from the service as a food service worker with the Department of the Air Force, U.S. Air Force Academy, Colorado, upon the agency's determination that he was physically disqualified for his position. The presiding official dismissed the appeal, concluding that, as a temporary appointee, appellant had no statutory right to appeal his removal to the Board under 5 U.S.C. 7511(a)(1)(A).

The initial decision dated October 30, 1979, specified that it would become "a final decision of the Merit Systems Protection Board on November 29, 1979, unless a petition for review is filed with the Board within thirty-five (35) calendar days of the date of this decision." Initial Decision at 2. Appellant's petition for review was dated December 18, 1979, and postmarked to the Board on January 10, 1980.

The Board's regulations provide at 5 C.F.R. 1201.113 that the initial decision of the presiding official shall become final 35 days after issuance, unless, *inter alia*, a petition for review is filed by a party to the appeal during that 35-day period. The time limit for filing a petition for review is not absolute, however, because the same section of the Board's regulations allows for extensions of time "for good cause shown." Under 5 C.F.R. 1201.22(b), the date of filing shall be deemed the date of mailing to the Board or receipt by the Board upon personal delivery.

In the instant appeal, the Board granted appellant 20 days from February 7, 1980, to submit any written argument that there was good cause for the untimely filing of his petition for review. Appellant's response, dated and postmarked March 3, 1980, or five days after the deadline set by the Board for submission of such response, essentially repeats appellant's assertion in his petition for review that the delay in filing the petition "was due to a delay in obtaining the information necessary to substantiate (his) claim of being carried as a career employee during the period of time in question and supplying this information to (his) representative."

The Board finds this assertion insufficient to show good cause for extending the filing time limit in this case, especially since the documents attached to the petition for review consist of forms that should have been in appellant's possession at the time this appeal was initiated.

Accordingly, the petition for review is DENIED as untimely filed.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is hereby advised of his right to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty calendar days of his receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 3, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

VICTOR T. SEALES
v.
U.S. POSTAL SERVICE

Docket No.
SF075299097

OPINION AND ORDER

Appellant was removed from his position of Mail Handler, effective June 8, 1979, based on a charge of submitting a falsified medical statement. On appeal to the San Francisco Field Office, the presiding official affirmed the removal action. The initial decision informed appellant, in detail, of the criteria on which the Board may grant a petition for review.

In his petition for review, appellant asserts that the Field Office decision was "biased in favor of management" and states, "I feel I am getting a raw deal since the decision of the Presiding Official is based upon an erroneous interpretation of statute or regulation." Appellant does not, however, present any arguments or documentation in support of his assertion of bias, nor does he identify the statute or regulation which was purportedly misinterpreted. The agency has not responded to the petition.

5 C.F.R. Section 1201.115 (1979), provides in full as follows:

> *Contents of petition for review.*
>
> The petition for review shall set forth objections to the initial decision, *supported by references to applicable laws or regulations, and with specific reference to the record.* After providing an opportunity for response by other parties, *the Board may grant a petition for review when it is established that:*
>
> (a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
>
> (b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation. (Emphasis added.)

The instant petition clearly fails to meet any of the criteria for review by the Board. The objections set forth are vague and conclusionary and are unsupported by reference to law, regulation, or the record. Moreover, based on the instructions contained in the initial decision, the Board concludes that appellant either knew or should have known what was required of him in this regard.

The petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

Ersa H. Poston.

Washington, D.C., *September 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH W. DOYLE
v.
VETERANS ADMINISTRATION

Docket No.
DA075299041

OPINION AND ORDER

Pursuant to notice the agency determined to remove the appellant from his position as Counseling Psychologist, GS-12, because of improper and unprofessional conduct. The appellant appealed the action to the Dallas Field Office and, following a two-day hearing, the presiding official issued his initial decision, rejecting a number of allegations of procedural errors and affirming the agency action.

With respect to the merits, the presiding official rejected the appellant's contentions that a witness' level of education or incapacity to read should discredit her testimony as a witness and found that the evidence failed to support the suggestion that three non-employee witnesses were influenced by consideration of monetary benefits or the actions of agency officials.

The presiding official concluded that the testimony of the three witnesses was more credible than the denials by the appellant and that the appellant's conduct violated agency regulations as charged and warranted the removal action "for such cause as will promote the efficiency of the service."

In his petition for review the appellant challenges the procedural findings of the presiding official, claiming that "he applied an erroneous interpretation of existing law (sic) rule or regulation in each instance." In addition, the petition alleges that the presiding official made an erroneous interpretation of 5 U.S.C. 7701(c)(1)(B) and 5 C.F.R. 1201.56(a)(1)(ii) in finding that the agency had shown by a preponderance of the evidence that the appellant was guilty of improper and unprofessional conduct.

The petition for review presents no new evidence. The Board finds no error in the presiding official's determination that the appellant was afforded fundamental due process and finds no basis for finding that the initial decision is based upon an erroneous interpretation of statute or regulation.

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board on this case. The appellant is hereby notified of his right to file a civil action in the United States Court of Appeals for the appropriate circuit or the United States Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 3, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

FREDERICK CARTER, III
v.
DEPARTMENT OF THE NAVY

Docket No.
PH075209037

OPINION AND ORDER

Respondent filed an appeal with the Board's Philadelphia Field Office on September 17, 1979, from an action taken by the Department of Navy removing him from employment, effective September 14, 1979. Respondent filed a "timely formal complaint" of discrimination with the agency on October 2, 1979. The presiding official found that the action of removal did not become appealable to the Board until there was a resolution of or decision on the formal complaint by the agency, or until 120 days from the date of the formal complaint had expired. See 5 C.F.R. 1201.154(a). Since neither of these criteria had been met, the presiding official dismissed the appeal without prejudice.

5 C.F.R. 1201.154(c) provides the appellant who has been subjected to an appealable action with the option of filing a timely complaint of discrimination with the agency or appealing to the Board within 20 days after the effective date of the action being taken.

The agency in its petition for review has asserted that the presiding official erred in his interpretation and application of the Board's regulations. The agency has maintained that the employee exercised his option under 5 C.F.R. 1201.154(c) by filing an appeal with the Board before he filed his complaint with the agency; therefore, the presiding official should have proceeded under 5 C.F.R. 1201.156, which allows the Board to decide the issue of discrimination or to remand the issue to the agency. The presiding official, however, dismissed the appeal without prejudice.

The Board has previously held that it need not delay its adjudication where the appellant initially chose to file his appeal containing an issue of discrimination with the Board and subsequently filed a complaint with the agency unless the parties agree and the presiding official finds that to do so would be in the interest of justice. See *Cardenas v. U.S. Postal Service* 1 MSPB 560 (1980). Thus, the agency interpretation is correct.

The Board notes, however, that as more than 120 days have now passed since a complaint was filed with the agency and an appeal has been refiled with the field office, the passage of time and events have rendered the agency's objection to the initial decision moot. Therefore, the petition for review is DISMISSED.

This is the final decision of the Merit Systems Protection Board in this case. The respondent is hereby notified of his right to petition to the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review the Board's decision within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 3, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

PAULINE CARDULLO
v.
DEPARTMENT OF THE NAVY

Docket No.
BN344309001

OPINION AND ORDER

Appellant, who formerly held both permanent and temporary appointments in the agency at GS-3, Step 9, subsequently returned to her job, but was reinstated as a GS-3, Step 1. In response to appellant's request dated November 7, 1979 for a restoration of her previous step level, the agency replied on November 21, 1979 that because she had voluntarily resigned from her position, agency policy prohibits the granting of an entrance level rate higher than the first step.

Appellant appealed to the Merit Systems Protection Board (hereinafter the "Board") to restore her grade level at the Naval Construction Battalion Center in Davisville, Rhode Island. The initial decision of the presiding official of the Board's Boston Field Office dismissed appellant's appeal to the Board for lack of subject matter jurisdiction.

5 C.F.R. 1201.115 states that the Board may grant a petition for review if it establishes that the presiding official's initial decision was based on an erroneous interpretation of statute or regulation or that it contains new and material evidence that was unavailable when the record was closed. In appellant's petition for review, dated January 14, 1980, she stated, "In support of my petition I cannot submit additional information nor can I submit or refer to applicable law, rule or regulation." In light of this statement and our review of the contentions she advanced with respect to the merits of the agency's action, the Board must conclude that the appellant has failed to meet either of the criteria for review as set forth in 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 4, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

GUY F. WILLIAMSON
v.
DEPARTMENT OF HEALTH AND HUMAN SERVICES

Docket No.
PH075299043

OPINION AND ORDER

The appellant, Guy F. Williamson, was discharged from his position with the respondent, Public Health Service, Department of Health and Human Services (formerly Health, Education, and Welfare). The reason for the discharge was alleged repeated failure to follow the procedures for obtaining leave approval.

The appellant appealed the removal action; after both parties had an opportunity to submit their evidence, the action was affirmed. Appellant petitioned the Board to review the initial decision, and his attorney submitted a statement in support of the petition.

It is argued by petitioner's attorney that the initial decision should be reversed because: the appellant was not informed he could have a representative during the agency proceedings, or in the initial appeal to the Board's Field Office; the agency violated provisions of 5 U.S.C. 2302(b), in that the proposing official had no personal knowledge of the charges and he failed to evaluate appellant's overall work performance; and the critical elements of appellant's position had not been identified by respondent so they could not fire him for unacceptable performance.

The contention that appellant was not informed that he had a right to counsel is factually incorrect.[1] The proposed removal letter had a "Supplemental Explanation of Rights" attached; the attachment informed appellant of his right to have representation throughout the proceedings. The letter of termination had a copy of the Board's regulations attached; the regulations informed appellant that he had a right to be represented. A letter of May 10, 1979, from the Board's Philadelphia Field Office, also informed him of that. A letter dated May 31, 1979, from appellant to the Board's Philadelphia Field Office, indicated that he had contacted a representative, evidencing knowledge of this right. Therefore, we find appellant's argument to be without merit.

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[1] We do not consider in this case whether, or under what circumstances, an appellant must be advised he has a right to be represented.

The further argument that the discharge "is not in accordance with the unacceptable performance standard required" by statute because the agency had not listed "the critical elements of an unacceptable work performance," is an apparent reference to Chapter 43 of Title 5 of the U.S. Code.[2] Appellant's argument on this point is erroneous. In *Wells* v. *Harris*, 1 MSPB 199 (1979), we held that an agency may not take an action based on "unacceptable performance" unless the process of Chapter 43 is followed. We said, however, that an agency could continue to take action under Chapter 75 until it established a Chapter 43 system.

In this case, appellant's removal was not for "unacceptable performance" as the term is used in Section 4303, and the requirements of that section are not applicable. Nonetheless, an employee's frequent, unscheduled absences have an obvious and direct effect on his work and the ability of the agency to meet its mission.

A removal taken by an agency pursuant to Chapter 75 need not include the critical elements of the job as justification for the action; the action must, however, promote the efficiency of the service. We find no error in the presiding official's conclusion that the instant removal met that standard.

The remaining argument advanced by appellant's attorney is that the official who proposed the removal had no personal knowledge of the alleged violations of procedures by appellant and that this was a violation of Section 2302(b)(2).[3] This argument construes Sections 2302(b)(2)(A) and (B) as prohibiting an agency official from taking action against an employee unless the official has personal knowledge of the charges, or has a report concerning the charges which includes only the information set forth in subsections (A) and (B). A plain reading of the statute does not tend to support this argument.

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[2] All references to Chapters or Sections are to Title 5 of the U.S. Code unless otherwise indicated.

[3] The Section reads as follows:

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—

(A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or

(B) an evaluation of the character, loyalty, or suitability of such individual. . . .

The sparse legislative history concerning this statute indicates that the section was intended to prevent the use of political influence to obtain a position or promotion. The pertinent Senate Report explained that:

> Paragraph (2) restates and expands 5 U.S.C. 3303, which currently prohibits consideration of recommendations submitted by senators or representatives, except as to character or residence. The paragraph adds a prohibition against soliciting any such recommendation. An exception is made for recommendations based on personal knowledge or personal records, where it consists of an evaluation of work performance, ability, aptitude, character, loyalty, or suitability. S. Rep. No. 969, 95th Cong., 2d Sess. 20 (1978).

While we do not decide the full extent and meaning of the statute, we do conclude that it is inapplicable in this case. Furthermore, we note that the "recommendation or statement" considered in taking action against appellant was "based on the personal knowledge or records of the person furnishing it," and that this information clearly concerns appellant's "general qualifications" for retention in his position. Accordingly, we find no error in this regard.

The arguments advanced by appellant's attorney do not establish that the initial decision was based on an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115(b). Therefore, the petition for review is denied.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 5, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICKY L. CHRISTO
v.
U.S. POSTAL SERVICE

Docket No.
DE075209001

OPINION AND ORDER

This matter comes before the Merit Systems Protection Board (the Board) by petition of Mr. Ricky L. Christo (petitioner) pursuant to the Board's authority under 5 U.S.C. § 7701(e)(1) (A) and (B). These provisions state:

> (e)(1) Except as provided in § 7702 of this title, any decision under subsection (b) of this section shall be final unless—(A) a party to the appeal . . . petitions the Board for review within 30 days after the receipt of the decision; or
>
> (B) the Board reopens and reconsiders a case on its own motion.

The petitioner was suspended and removed from the position of Mail Handler, U.S. Postal Service, Denver, Colorado for making threatening remarks to his group leader on May 3, 4, and 25, 1979. The 30 day suspension was effective June 20, 1979, and petitioner was removed effective July 20, 1979. Petitioner appealed his suspension to the Board's Denver Field Office on July 16, 1979, and by letter of July 27, 1979, amended his appeal to include the removal. On July 18, 1979, petitioner filed a formal EEO complaint with the Postal Service regarding both his suspension and removal.

The two actions were joined for purposes of the Board's appellate processing. 5 U.S.C. § 7701(f)(2); 5 C.F.R. § 1201.36(a)(1). In his initial appeal petitioner alleged, among other things, that the action of the agency was occasioned by prohibited discrimination based on color and handicapping condition. The initial decision of the presiding official, issued under date of October 9, 1979, affirmed the removal action. However, it contained no analysis of the merits of the suspension action nor did it address the allegation of prohibited discrimination. The decision did contain a finding that ". . . the suspension and removal actions effected against him (the petitioner) were taken for such cause as will promote the efficiency of the service." Initial decision at 3. The decision made no other reference to the merits of the suspension action.

In his petition of November 3, 1979, and his subsequent submissions, the petitioner requested that the Board reopen and reconsider the initial decision of the presiding official. He asked that the Board review the entire record to evaluate the evidence in that the decision of the presiding official was not supported by the record. Specifically, he took issue with the presiding official's:

> (1) summary rejection of his testimony as "self serving and less than credible";
>
> (2) failure to discuss the potential of a lesser penalty under the circumstances of the case, especially in light of the appellant's assertion of his innocence and the characterization of his supervisor's temperament in his work relationships;
>
> (3) summary dismissal of the appellant's allegation that the investigation by the USPS into the matter was improper, and his rejection of this contention by simply saying that no "violation of law or regulation" had been shown;
>
> (4) reliance on Office of Personnel Management regulations promulgated on August 10, 1979, which were not in effect when the appealed actions were effected. The petitioner contends that an action against an employee must be taken in accordance with regulations promulgated by the Office of Personnel Management (5 U.S.C. § 7513) and no such regulations were in force at the time;
>
> (5) reliance on section 666.2 of the Employee and Labor Relations Manual, USPS, without setting forth a basis upon which a violation could be inferred. Petitioner argues that the section is so vague and overbroad as to be unconstitutional.

Petitioner also submitted statements from fellow employees (which he alleged were not previously available) concerning his supervisor's personality and supervisory practices. In rebuttal, the Postal Service argues that the petition did not meet the criteria for reopening set forth in 5 C.F.R. § 1201.115 and that the statements submitted do not constitute new evidence unavailable at the time of the hearing.

ISSUES PRESENTED:

> (1) Has the petitioner presented argument tending to establish that either regulatory criterion for reopening set forth in 5 C.F.R. § 1201.115 has been met?
>
> (2) Although not raised by the petition, was the presiding official's failure to address and dispose of the allegation that the petitioner's suspension and removal were based on pro-

> hibited discrimination, or his failure to analyze and dispose of the suspension appeal, sufficient cause for the Board to reopen the initial decision upon its own motion under authority of 5 U.S.C. § 7701(e)(1)(B) and the implementing regulation, 5 C.F.R. § 1201.117?

STATUTORY AND REGULATORY ANALYSIS:

The Board's statutory authority to reopen and reconsider the initial decision of a presiding official is set forth in 5 U.S.C. § 7701(e)(1)(A) and (B). Implementing regulations were promulgated by the Board on June 29, 1979, and published in 44 Fed. Reg. 38356 (1979) (amending 5 C.F.R. Part 1201).

5 C.F.R. § 1201.115 provides in pertinent part ". . . the Board may grant a petition for review when it is established that:

> (a) New and material evidence is available that despite due diligence, was not available when the record was closed; or
>
> (b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation."

The petitioner generally argues in his appeal that the presiding official was incorrect in his findings of fact and requests a review of the entire record. However, the Board has ruled in *Weaver* v. *Department of the Navy*, 2 MSPB 297 (1980), that where credibility is in issue due deference must be given to the findings of the presiding official. The Board will undertake a complete review of the record only in cases where the presiding official's finding of facts violates the statutory or regulatory standard of review. In *Weaver* the Board stated:

> A mere conclusory allegation of factual error cannot be sufficient to trigger such a review, in view of Congress' clear desire to restrict the former multi-level appeals process. Before the Board will undertake the burden of a complete review of the record, the petitioning party must, as the regulation plainly states, explain in the petition why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error.

Based on the foregoing, petitioner has not made a sufficient showing in regard to allegation 1 to justify Board review. Similarly, in regard to allegation 3, petitioner has made no showing of in what respect the Postal Service has failed to conform to any regulatory requirements concerning petitioner's adverse action. In light of our ultimate disposition of this case we need not consider whether allegation 2, standing alone constitutes a regulatory basis for granting the petition.

The fourth allegation must be rejected for the reason that, although it is true that the presiding official referred to final regulations of OPM which were not yet existent at the time the adverse actions appealed were effected, the erroneous citation had no invalidating consequences. The Office of Personnel Management had issued regulations implementing the statutory requirements of 5 U.S.C. §§ 7511-7514 on January 16, 1979, 44 Fed. Reg. 3445 (1979), which were effective on January 11, 1979, and which in all relevant aspects were the same as the regulations referenced by the presiding official.

Concerning petitioner's fifth contention, the presiding official's finding that his conduct in threatening a fellow worker was violative of Part 666.2 of the Postal Service Employee and Labor Relations Manual as charged by the Service did not require further elaboration. The cited section set forth a general statement concerning the Postal Service's expectation that employees will conduct themselves in such a manner, both during and outside working hours, as to reflect favorably upon the Postal Service. The presiding official properly applied the preponderance of the evidence standard to this portion of the agency's case.

Lastly, the introduction of several statements signed by fellow employees without any explanation as to the reason those statements could not have been secured and submitted into the appellate record during the initial processing of his appeals must be rejected for failure to show that those statements constituted new evidence that was not available when the record was closed.

Although the petitioner has not taken issue with the fact that the initial decision did not analyze the appeal of the suspension, or with the failure of the presiding official to address and dispose of the allegations that the suspension and removal actions were based on prohibited discrimination because of color and handicapping condition, the Board has reviewed those matters on its own motion under the authority provided in 5 U.S.C. § 7701(e)(1)(B) and 5 C.F.R. § 1201.117, which states—

> The Board may reopen and reconsider a decision of a presiding official on its own motion at any time, notwithstanding any other provisions of this part.

The initial decision of the presiding official recognized that the petitioner had appealed both a 30 day suspension and a removal action taken against him by the Postal Service. The suspension was effected during the notice period of the removal action for the reason that the retention of the petitioner in an active duty status might result in injury to a Postal employee. The specifications in support of the suspension are identical to those cited in the removal action, and although the analysis of the evidence addressed the specifications to the charges, it did not recognize that the reason stated for suspension was the possibility of injury to a fellow employee. The analysis did not address whether a suspension was in order under the circumstances except, as noted earlier, for a general finding that the suspension was for such cause as will promote the efficiency of the service.

5 C.F.R. § 1201.111 provides, in pertinent part—

> (b) Each initial decision shall contain:
>
> (1) Findings of fact and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact and law presented on the record;
>
> (2) An order as to the final disposition of the case, including appropriate relief;

The Board finds that the initial decision was not dispositive of the petitioner's appeal of the suspension action, and therefore, that it represents a misapplication of Board regulation.

The remaining issue before the Board is whether the presiding official erred in not addressing the petitioner's allegation that the adverse actions were based on prohibited discrimination.

The provisions of 5 U.S.C. § 7702 vest authority in the Board to decide allegations that discrimination prohibited by law was a basis for an action otherwise appealable to the Board in conjunction with the adjudication of the otherwise appealable matter. The Board issued final regulations implementing 5 U.S.C. § 7702 to be effected June 30, 1979. 5 C.F.R. § 1201, Subpart D.

5 U.S.C. § 7702(a)(2) provides that any matter originally brought before an agency which involves (1) any action which may be appealed to the Board, and (2) any issue of prohibited discrimination, shall be resolved by the agency within 120 days. An employee may appeal to the Board from the agency decision and, under section 7702(e), an employee may appeal to the Board at any time after the 120th day following the filing of any matter described in § 7702(a)(2). The Board construes these provisions as, in effect, establishing a multi-level, rather than concurrent, appellate procedure. To implement that congressional intent the Board promulgated 5 C.F.R. § 1201.154, which provides, in relevant part:

> Following are the requirements for filing a petition raising issue of prohibited discrimination:
>
> (a) Where the appellant has filed a timely formal complaint of discrimination with the agency:
>
> (1) A petition must be filed within 20 days after receipt of the agency resolution or final decision on the discrimination issue; or
>
> (2) When the agency has not resolved the matter or issued

> a final decision on the formal complaint within a 120-day period, the appellant shall nonetheless file an appeal to the Board within a year after the filing of the formal complaint with the agency.

Thus, § 1201.154 clearly provides that if an employee initially files a formal complaint of discrimination before the agency, the Board cannot take jurisdiction of an appeal unless the agency has issued a final decision in the case, or 120 days have elapsed without issuance of a final decision. The Board has previously construed this regulation to hold that when an appellant files a formal complaint of discrimination with the agency subsequent to appealing to the Board, the Board need not delay its jurisdiction to await the agency issuing a final decision, or the 120 day period elapsing. *Cardenas* v. *United States Postal Service*, 1 MSPB 560 (1980).

In the instant case petitioner filed a formal EEO complaint regarding his suspension and removal on July 18, 1979. Petitioner filed an appeal of his suspension on July 16, 1979, and appealed his removal to the Board on July 27. Inasmuch as the suspension appeal was filed prior to the formal EEO complaint, the suspension action was correctly before the Board. However, the removal appeal post-dated the filing of an EEO complaint on the same matter.

Accordingly, the presiding official erred in taking jurisdiction of the appeal of the removal. This result is in part dictated by our conclusion that a "formal complaint" under 5 C.F.R. § 1201.154 should be accorded the same meaning as "complaint" as it appears in 29 C.F.R. § 1613.213. Therefore, informal contacts with an EEO counselor under the procedures of 29 C.F.R. part 1613, made prior to the filing of a complaint do not serve to delay the Board's jurisdiction. However, since more than 120 days have passed since the EEO complaint was filed with the agency, we find that both the suspension and removal may now properly be adjudicated by the presiding official.

Accordingly, it is ordered that the initial decision of the presiding official is hereby VACATED and the case is REMANDED to the Field Office for:

(1) further development of the affirmative defense raised by petitioner that the actions against him were based in whole or in part on discrimination based on color and handicapping condition; and

(2) a new adjudication of the appeals.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 5, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JUDITH M. MILLS v. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE	Docket No. CH531D99003

OPINION AND ORDER

The appellant's within-grade salary increase, for which she completed the required 52-week waiting period on January 13, 1979, was withheld by her employing agency, the Social Security Administration, Markham, Illinois. She appealed to the Board's Chicago Field Office. The initial decision sustained the withholding action. In her petition for review, the appellant states that she was never given an opportunity to request a hearing. She also contends that the initial decision is not in accord with the provisions of the Civil Service Reform Act of 1978. In its response the agency argues that the criteria for granting a petition for review have not been met.

The reconsideration decision on the negative determination regarding the appellant's performance was issued February 27, 1979. By undated petition received March 15, 1979, the appellant appealed to the Chicago Field Office. In that petition, the appellant identified John Soliunas as her representative. Although the appellant had signed the petition, the field office acknowledged the appeal by writing to representative Soliunas and requesting that he file a formal designation of representative form so that he might be recognized in the proceeding before the field office. Simultaneously, a request for the reconsideration file was sent to the agency. In part, that letter stated:

> The appellant, assuming we accept jurisdiction in this matter, is entitled to a hearing, and to submit evidence and argument in support of the appeal. If the appellant does not exercise those rights, after having reviewed the information you submit in response to this letter, we will consider the record closed and will adjudicate the appeal on the evidence before us. Therefore, you should submit, in response to this letter, all evidence and argument you wish the presiding official to consider.

A copy of this letter was furnished to the appellant. A second request for the reconsideration file had to be made on April 26,

1979. The reconsideration file was received by the field office on May 8, 1979. No certificate of service was included with the reconsideration file. Therefore, the field office wrote the agency instructing it to provide a copy of the file to the appellant. That letter, dated May 9, 1979, stated in part:

> It should be noted that the appellant is entitled to a hearing in conjunction with her appeal. Although her petition for appeal has not, as yet, been amended to include a request for a hearing, it is also asked that your agency name a representative at this time so that we may expeditiously proceed should the hearing be requested.

A copy of this letter was aiso sent to the appellant. On May 17, 1979, the agency responded, designating a representative and informing the field office that a copy of the file had been sent regarding this case and no further submissions to the record were made. The Board finds from the above that the appellant was informed via copies of letters to the agency that she did have a right to a hearing, but at no time was she informed how she was to make her request for a hearing to the field office.[1] Since the appellant is entitled by statute to a hearing (5 USC 7701(a)(1)), the Board finds that the processing of this appeal effectively denied the appellant the opportunity to exercise that statutory right and that the case must be remanded to the field office so that the appellant may be given the opportunity to be heard.

Upon remand, the case should be decided in light of the Board's decision in the case *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). It was not clear what standard of proof the presiding official used in deciding this case. He stated on page 4:

> As noted above, the Board's authority under 5 CFR 531.407 does not extend to a review of the merits of the withholding

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[1] General practice, upon receipt of an appeal filed in the manner of this one, is for the field office to send an acknowledgement which provides the following:

> "If you did not request a hearing in your petition for appeal, you may amend your petition to submit such a request within ten (10) calendar days after your receipt of this letter. Unless you have requested a hearing by this time, you will have waived your right to a hearing and the presiding official will adjudicate the case on the record after providing you and the other parties the opportunity to file written submissions."

Upon assignment of the case, the presiding official was obligated to determine that the appellant had been provided all necessary information regarding her rights in the processing of the appeal. Any lack of notice should have been remedied before closing the record. A single notice, as set forth, provides an appellant with sufficient notice of the hearing right and opportunity to exercise that right. If no hearing is requested after notice, the case can proceed without further attempts to ascertain appellant's desire for a hearing.

action, but is limited to the determination as to whether a valid basis exists for the negative determination.

As stated in *Parker,* all relevant evidence must be considered in determining whether the agency's negative determination has been sustained by substantial evidence, just as the entire record must be considered in determining whether the appellant has established an affirmative defense under 5 U.S.C. 7701(c)(2). Here, the appellant has raised allegations regarding improper interpretation of the Civil Service Reform Act, specifically concerning the failure of the agency to properly establish performance standards, which may be considered by the presiding official under 5 U.S.C. 7701(c)(2)(B) or (c).

Accordingly, the petition for review is granted. The initial decision is VACATED and the case is REMANDED to the field office for processing consistent with this Opinion and Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 5, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

EVELYN SIMPSON
v.
DEFENSE LOGISTICS AGENCY

Docket No.
AT075209013

OPINION AND ORDER

The appellant, acting *pro se*, filed a letter dated May 10, 1979, constituting her petition for appeal with the Board [1] from the action of the Defense Logistics Agency separating her by resignation effective February 12, 1979, from her position of Communication Equipment Operator (Typist), GS-392-04, in Birmingham, Alabama.

A hearing was held on September 11, 1979, before a presiding official of the Atlanta Field Office, in which the appellant was represented by her union representative. The evidence adduced revealed, in pertinent part, that the appellant reported for work only on six days for the period from January 2, 1979, through February 12, 1979, and that she or various friends or relatives telephoned the agency on all of the absentee days save two to request sick leave or annual leave due to the alleged illness of the appellant or of her baby. The appellant's supervisor executed and mailed to the appellant's address on February 8, 1979, a notice proposing a reprimand of the appellant for her absence without leave on February 1, 1979 and on February 6, 1979. The appellant attested that she did not receive the notice of proposed reprimand.

The appellant's supervisor testified that on February 13, 1979, the appellant telephoned her at work and stated that she knew of the reprimand for absence without leave or that such a reprimand was being proposed. The appellant allegedly stated her desire to resign effective February 12, 1979, that she did not wish to return to the agency and that she wanted any papers effecting her resignation to be mailed to her. The appellant's SF-52, "Request for Personnel Action," and subsequently her SF-50, "Notification of Personnel Action," were prepared and recorded her separation by resignation effective February 12, 1979. The appellant denied that she telephoned her supervisor on February 12, 1979, and asserted that she did not then or at any time submit her resignation.

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[1] The appeal was addressed to the Special Counsel at the Atlanta Field Office of the Board where there was no Special Counsel at that time. It was forwarded to the Board in Washington, D.C. and returned to the Atlanta Field Office without knowledge of the parties.

The appellant alleged that by letter dated and mailed February 1, 1979, she requested to be placed on leave without pay effective February 1, 1979. The envelope containing the letter, however, was not postmarked until March 6, 1979, and it was not received by her supervisor until March 8, 1979. The appellant, additionally, never returned to work after February 13, 1979, nor did she contact her supervisor or any other agency official to ascertain the status of her request for leave allegedly mailed on February 1.

The appellant testified that she first learned of her resignation in the latter part of February 1979, when she received by mail a copy of the SF-52. The appellant's representative contacted the agency in the middle of March 1979, and was informed that the appellant had submitted her resignation effective February 12, 1979, which the agency had accepted.

The transcript of testimony also reveals that on April 11, 1979, the appellant filed a formal EEO complaint with the agency, alleging discrimination based on sex (female) and race (black). The complaint was forwarded to the agency's regional EEO officer in Atlanta on May 11, 1979, who subsequently rejected the complaint as not within the purview of the agency due to the appellant's resignation. The appellant's petition for appeal dated May 10, 1979, did not raise any allegations of prohibited discrimination. At the Field Office hearing, the appellant, by her representative, expressly waived on the record any allegations of prohibited discrimination.

The presiding official, by initial decision dated October 16, 1979, found that the appellant did submit her resignation by telephone to the agency on February 13, 1979, effective February 12, 1979. The presiding official also found that the appellant was on notice on February 12, 1979, of the agency's proposed reprimand and that she did not timely mail her request for leave without pay on February 1, 1979, since it was not postmarked until March 6, 1979. The presiding official finally found that her resignation was a voluntary action in response to the agency's proposed reprimand and was not the consequence of coercion by the agency. The presiding official, in sum and substance, found the agency's evidence and version of events more credible than that of the appellant and that she failed to meet her burden of proof as to the issue of jurisdiction, 5 C.F.R. 1201.56(a)(2). Finding that the appellant's voluntary resignation "was not subject to the requirements of 5 U.S.C. 7512-7513," the presiding official dismissed her appeal for want of jurisdiction in the Board.

The appellant, by her representative, timely filed with the Board on November 13, 1979, a petition for review dated November 7, 1979. The petition asserts that the presiding official disregarded the appellant's proffered evidence that she was physically incapable of telephoning her resignation to her supervisor on February 12, 1979, and that he incorrectly found that the appellant had notice of the agency's proposed reprimand. The agency's response filed December 11, 1979, asserts that the presiding official's analysis, evaluation of evidence and finding of facts "were fair and equitable" and that the "record speaks for itself."

The Board first addresses the jurisdictional issue which is implicit in this case. That issue is whether the presiding official properly found that this appeal was within the purview of the Board as the appellant had filed a formal EEO complaint with the agency on April 11, 1979, which it did not reject for lack of purview before May 10, 1979, the date of her petition for appeal. 5 U.S.C. 7702(a)(2) provides that any matter before an agency which involves any action which may be appealed to the Board and which alleges that a basis for the action was prohibited discrimination, shall be resolved by the agency within 120 days. An employee or applicant for employment may appeal to the Board only after the agency decides the matter, *id.*, or after the 120th day after filing the matter with the agency. 5 U.S.C. 7702(e)(2). *See* then effective interim regulation 5 C.F.R. 1201.153(a)(1)(2) (1979), and current regulation 5 C.F.R. 1201.154(a)(1)(2), effective June 30, 1979.

The appellant in her petition for appeal and at the Field Office hearing however, did not allege that a basis for her alleged involuntary separation was prohibited discrimination within the ambit of 5 U.S.C. 7702. She expressly waived any allegation of prohibited discrimination before the presiding official. As her appeal was not based on an action involving prohibited discrimination under section 7702, the provisions of that section did not foreclose the Board's jurisdiction to entertain her petition, notwithstanding that the issue of prohibited discrimination was before the agency when the appellant filed her petition for appeal. Furthermore, the matter has now been rendered moot by the passage of time, since more than 120 days elapsed from the initial complaint, and the agency issued a decision on it.

With respect to those matters raised in the appellant's petition for review, we find that they fail to set forth objections to the initial decision supported by references to applicable laws or regulations. 5 C.F.R. 1201.115. Nor does the petition establish that new and material evidence is available that, despite due diligence, was not available when the record was closed, or that the decision of the presiding official is based on an erroneous interpretation of statute or regulation. *Id.* The appellant's mere assertions, unsupported by new and material evidence or applicable laws or regulations, that the presiding official's decision dismissing her appeal for want of jurisdiction in the Board was based on an erroneous finding of facts simply fails to meet the Board's regulatory criteria for review. The presiding official properly applied the law to the circumstances of the case and reached a decision based on explicit findings of credibility. When questions of credibility are presented, the Board must necessarily give due deference to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses. *Weaver v. Department of the Navy*, 2 MSPB 297 at 299. The petition for review does not demonstrate consistent with 5 C.F.R. 1201.115(b), that the initial decision is based on an erroneous interpretation or application of the statutory requirements governing the weight of the evidence. *Id.* at 299. The appellant's arguments provide no basis for the reopening of her case.

Accordingly, the petition for review of the initial decision of the presiding official is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 5, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

PATSY VANDIVER
v.
GENERAL ACCOUNTING OFFICE

Docket No.
DC075299062

OPINION AND ORDER

On April 30, 1979, the appellant *pro se*, a GS-510-13 Supervisory Auditor with the General Accounting Office, filed a petition for appeal with the Board's Washington, D.C. Field Office alleging that her resignation from the agency on April 11, 1979, was involuntary. A hearing on the merits was held on July 11, 1979, at which the appellant was represented by legal counsel. The appellant's Federal employment record from June 1968 to March 1979 was marked by reports of her satisfactory performance and steady promotions in grade. The presiding official found in her initial decision filed on September 5, 1979, that by March 1979, the appellant's erratic and violent behavior had become a problem to the agency. On April 3, 1979, the appellant was called into her supervisor's office and given the options of seeking counseling or resigning. Otherwise, she was told, the agency would initiate an adverse action against her. The appellant chose counseling, but after several sessions she declined to continue the consultations. On April 11, 1979, after another emotional outburst, the appellant was again called into her supervisor's office. After discussion of her options, the appellant was presented with a partially typed resignation form, effective immediately, which she signed. She was then instructed by her supervisor to leave the building immediately.

The presiding official found that the appellant's resignation was involuntarily rendered, and as such, it was tantamount to an adverse action within the appellate jurisdiction of the Board. The presiding official also found that the agency committed harmful procedural error when it failed to use appropriate adverse action procedures to remove the appellant. Accordingly, the appellant's removal was reversed. The agency timely filed a petition for review from the Field Office initial decision. The agency contended that the decision was based, in part, "on erroneous interpretations of statute or regulation" and urged that on the facts presented the appellant's resignation was voluntary as a matter of law.

It is well settled that the voluntary nature of a resignation is an issue of fact. *McGucken v. United States*, 407 F.2d 1349, 1351 (Ct. Cl.), *cert. denied*, 396 U.S. 894 (1969); *Paroczay v. Hodges*, 297 F.2d 439, 441 (D.C. Cir. 1961). Although employee resignations are presumed to be valid, *Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975), this presumption will not prevail if the employee comes forward with sufficient evidence to establish that the resignation was involuntarily extracted or coerced.

The standards for determining duress have been set forth in *Fruhauf Southwest Garment Co. v. United States*, 111 F. Supp. 945, 951 (Ct. Cl. 1953):

> These are: (1) that one side involuntarily accepted the terms of another; (2) that circumstances permitted no other alternative; and (3) that said circumstances were the result of coercive acts of the opposite party.

The presiding official, upon review of the testimony and other evidence presented, found that the appellant's case was more persuasive than the agency's and that sufficient credible facts were presented to establish the involuntariness of her resignation. These findings were supported by the evidence of record and were made by the trier of fact who was in the best position to judge the credibility of the witnesses. *Morris v. United States*, No. 168-79C (Ct. Cl. May 23, 1980). *See Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980).

As the Board stated in *Weaver, supra*, at 299:

> . . . Board review of the presiding official's fact finding will ordinarily be undertaken only when the petitioning party makes a showing consistent with 5 C.F.R. 1201.115(b), which requires a demonstration that the initial decision is based on an erroneous interpretation (or application) of the statutory requirements governing the weight of the evidence. While the language of the petition may be simply drawn, there must be at least enough specified in the petition to enable the Board to ascertain whether there may be a serious evidentiary question justifying a complete review of the record. A mere conclusory allegation of factual error cannot be sufficient to trigger such a review, in view of Congress' clear desire to restrict the former multi-level appeals process. Before the Board will undertake the burden of a complete review of the record, the petitioning party must, as the regulation plainly states, explain in the petition why the challenged factual determination is incorrect, and identify the specific evidence in the record which demonstrates the error.
>
> (Footnote omitted.)

Among facts found by the presiding official were that the appellant was given no time to consider her course of action or to consult with anyone when her resignation was abruptly obtained and that the agency had reason to believe that the appellant's volatile state of mind at that time rendered her incapable of exercising intelligently her choice to resign or not.

Upon all the facts and circumstances presented, the presiding official found that the appellant's resignation had been coerced. A resignation which has been coerced is, in substance, a removal action by an agency, *Dabney v. Freeman,* 358 F.2d 533, 535 (D.C. Cir. 1965), within the appellate jurisdiction of the Board under 5 U.S.C. 7512.

In its petition for review, the agency has contended that the initial decision of the presiding official represents an erroneous interpretation of statute or regulation and therefore should be overturned. However, the agency argues, *inter alia,* that the appellant had sufficient time to consider the ramifications of the choices confronting her and in effect that her resignation was not coerced. In the Board's view, these contentions represent disagreement with the presiding official's interpretation of the evidence and as such represent mere disagreement with the factual findings of the presiding official. As noted above, a mere conclusory allegation of factual error is not sufficient to trigger a complete review of the record by the Board as such factual disagreement would not establish an erroneous interpretation of statute or regulation.

Inasmuch as a determination of the voluntariness of a resignation is a question of fact, *McGucken, supra,* and as the Board does not find that the decision of the presiding official is based on an erroneous interpretation of statute or regulation, 5 C.F.R. 1201.115 (b), the petition for review of the initial decision of the presiding official is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 5, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

William M. Malko
v.
U.S. Postal Service

Docket No.
NY035309001

Opinion and Order

The petition of November 7, 1979 requesting the Board review the October 4, 1979 initial decision of the presiding official is GRANTED.

I. FACTUAL BACKGROUND:

The appellant was employed by the agency from December 1965 to February 24, 1968, when he was inducted into the U.S. Army on February 28, 1968. He was separated on December 17, 1969 with an undesirable discharge. On December 23, 1969 he sought to be "reinstated" to a position with the agency, and his application was denied on January 8, 1970. In 1975 appellant made his first attempt to have his discharge upgraded. On August 29, 1978 the Army Discharge Review Board gave appellant unofficial notification of the upgrade of his discharge to honorable. After receiving official notice of the upgrading in April 1979, appellant requested reemployment with the agency but this request was denied. He appealed to the Board's New York Field Office.

The presiding official, in the initial decision of October 4, 1979, found, based on the decision of the Army Review Board and the issuance of the subsequent honorable discharge, that appellant's original 1969 undesirable discharge was void *ab initio.* Further, based on the decision in *Robertson v. Richmond F. & P.R. Co.,* 178 F. Supp. 734 (D.Va. 1959), the presiding official concluded that appellant's April 1979 application for restoration was an extension of or follow-up to his timely-filed December 1969 application, and, therefore, he met the requirements of the law, 38 U.S.C. 2201 et seq., regarding restoration after military service. Accordingly, the agency's refusal to restore the appellant to his former position was adjudged improper and void, and the presiding official directed the restoration of appellant effective 30 days after his application was received in April 1979, with appropriate benefits warranted under the circumstances.

In the petition of November 7, 1979, the agency asserts that the field office decision relied almost totally on *Robertson, supra*, and that such reliance was substantially misplaced since that case is distinguishable from appellant's case. Basically, the agency argues that appellant was not prompt and diligent in the prosecution of the discharge appeal to the Army and that the agency acted properly in 1969 in not restoring appellant because he lacked the requisite proof of satisfactory completion of military service; the fact that the appellant obtained such proof some ten years later does not change that fact. The agency also contends that when appellant failed to obtain a certificate of satisfactory completion of military service within 90 days of release from military service, he lost his restoration rights.

The Office of Personnel Management (OPM), as intervenor, agrees with the agency that the decision in *Robertson* is distinguishable from this case in that appellant, after making a timely application, did not act during the 90-day limit to upgrade his discharge, and the delay was attributable to appellant and not, as in *Robertson*, to the time-consuming discharge review procedure. In addition, OPM contends that the five year delay in seeking the upgrading of the discharge worked to the disadvantage of the agency.

In his response, appellant, through counsel, contends that the law requires that the veteran first receive a certificate of satisfactory service and then, within 90 days of release from service, make application for restoration. Appellant concludes that the initial decision should be affirmed and the decision modified by deleting any loss of seniority.

II. ISSUES PRESENTED:

Whether under the circumstances of this case, appellant met the statutory requirements for restoration after military duty.

III. DISCUSSION:

Title 38, U.S. Code, Section 2021 et seq., provides, in pertinent part, for the right of reemployment of an inducted person who:

> "(1) receives a certificate described in section 9(a) of the Military Selective Service Act (relating to the satisfactory completion of military service), and
>
> (2) makes application for reemployment within ninety days after such training and service. . . ."

As mentioned above, appellant was not reemployed by the agency after completing military service because he received an undesirable discharge in December 1969. His discharge was subsequently upgraded to honorable, apparently sometime in October

1978 (Appellant's Hearing Exhibit 10), although appellant was given unofficial notification of the upgrade by letter dated August 29, 1978, from the Army Discharge Board, and received final, official notice in April 1979.

The clear intent of the above-cited law and the Office of Personnel Management regulations and guidelines (Part 353 of Title 5 of the Code of Federal Regulations; Federal Personnel Manual Chapter 353) is that once a person meets the criteria for restoration, then he or she is entitled to be restored to employment to the position left, or to a position of like seniority, status, and pay, as a matter of *right*. An agency must consider him or her to have been on furlough or leave of absence during that duty; and must restore the individual with the status he or she would have had if the individual had never left for military duty. See *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946); *Hilton v. Sullivan*, 334 U.S. 323 (1948); *Tilton v. Missouri Pacific R.R. Co.*, 376 U.S. 69 (1964); *Accardi v. Pennsylvania R.R. Co.*, 383 U.S. 225 (1966); *Alabama Power Co. v. Davis*, 431 U.S. 581 (1976). This is to be contrasted to a reinstatement action wherein an agency may exercise a substantial measure of discretion in reemploying the individual. See generally, 38 U.S.C. 2014 and 5 C.F.R. 307 regarding noncompetitive veterans readjustment appointments, in which the character of an acceptable discharge now "is other than dishonorable conditions."

In the instant case, appellant has not met the aforementioned requirements for mandatory restoration. He was not released under honorable conditions in 1969. His 90-day period for applying for restoration began after his separation from the military service on December 17, 1969 and expired 90 days thereafter. The fact that the character of his discharge was changed approximately nine years later does not alter, in any way, the fact that appellant did not have restoration rights at the time of his December 1969 request and no appeal was taken from the agency's denial of that request.

In *Robertson, supra*, the returning employee started immediate action to upgrade his discharge after his request for his old job was refused. The District Court stated that "although the correction was not made until the expiration of more than 90 days, the delay was attributable to the time consumed by the proceedings of the Army—something wholly beyond the plaintiff's control. On his part the prosecution was prompt and diligent." 178 F. Supp. 734, 735. The court further stated that the application, once seasonably made, preserved the right of restoration until a final decision was made in proceedings provided by law, upon the kind of discharge to which the veteran was entitled. *Id.* Thus, the court's finding was based on the timeliness of the restoration request and the fact that the discharge review proceeding was timely commenced and awaiting disposition, and not, as argued by appellant, merely that a timely request for restoration once made is sufficient to preserve the right of restoration until the other requirement of the statute is met, i.e., presentation of the certificate of satisfactory service.

The crux of the matter revolves around the bringing of proceedings for an upgraded discharge within the prescribed 90-day period for seeking restoration. There is no dispute that appellant made timely application for restoration in December 1969. However, he did not take any action to upgrade his undesirable discharge during the 90-day period. Rather, the record reflects that his first attempt for an upgraded discharge, which was unsuccessful, was not made until early 1975, a period of over 5 years. It would nullify the specific requirements of the law if a former employee who had no certificate of satisfactory service could compel reemployment upon the ground that approximately 10 years later such evidence of satisfactory completion of service was secured and presented. No authority has been cited which holds that an upgraded discharge reverts back in time after the 90 days has elapsed when no timely action has been taken regarding the nature of the discharge.

We are keenly aware that the Federal statutes providing for the protection of discharged veterans on return to civilian status are to be given liberal construction for the benefit of the veteran, *Fishgold, supra,* as long as violence is not done to the exact language of the statute. See *Tilton, supra.* Pursuant to 38 U.S.C. 2021 et seq., the veteran must apply for reemployment within 90 days of the date of which he is released from the service with a certificate showing honorable military service. Although appellant made a timely request for restoration, he did not act to upgrade his discharge seasonably, i.e., within the 90-day statutory period. Appellant permitted an inordinate amount of time to elapse before he initiated action for a reconsideration of his discharge. Moreover, the reasons or policy for the upgrade appear no more viable in 1979 than in 1969, which indicates that an attempt for upgrading in 1969 would not necessarily have been a fruitless act.[1]

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[1] The Board is aware of recent manifestations of legislative and executive recognition that Vietnam era veterans have unique and significant problems in finding employment upon separation from the military. See, e.g., Vietnam Era Veterans' Readjustment Assistance Act of 1974; E.O. 11521. Furthermore, conditioning employment opportunity on the possession of an honorable discharge raises interpretive questions under the Civil Rights Laws. See, e.g., *Dozier v. Chupka,* 395 F. Supp. 836 (S.D. Ohio 1975); EEOC Decision No. 74-25, September 10, 1973, CCH Employ. Prac. Guide section 6400. Our nar-

Since a period of over 10 years had elapsed between the appellant's release from active duty and the request for restoration on which this case is based, appellant would have been eligible for restoration only if a new period of restoration eligibility had been created by the Discharge Review Board's decision to upgrade his discharge or if the filing with the Discharge Review Board would have caused his original period of eligibility to be extended. We find that the statute provides for neither of these situations.

The statute mentions only the date of actual separation from military service or training as a reckoning point for calculation of the veteran's period of eligibility for restoration. No provision is made for entitlement to restoration merely because an upgraded discharge has been received. Similarly, the statute contains no provision for extension of restoration rights on the basis of appeal to the Discharge Review Board. A specific statutory extension does exist but it concerns only those veterans who are hospitalized continuously after discharge and it is limited to a period of only one year. 38 U.S.C. 2021(a).

Presumably, in light of *Robertson*, appellant would have been entitled to restoration if he had applied for the upgraded discharge within 90 days of separation. However, the statute contains no provision which would entitle a veteran in appellant's circumstances to restoration after that original 90-day period had elapsed where the delay was within the veteran's control.

It is difficult under the circumstances not to sympathize with the predicament in which the appellant finds himself. However, he is seeking to assert a statutory right and in order to prevail he must bring himself within the terms of the statute creating it. Plainly the statute does not confer upon the appellant the right asserted. The appellant was separated from the military with an undesirable discharge in December 1969 and secured an honorable discharge in 1978.

Although it can be argued that Congress should have provided some protection for an individual who secured an honorable discharge almost 10 years after his release from the military, the Board cannot ignore the language of the statute. The relief sought by the appellant must be denied.

IV. CONCLUSION:

Based on the foregoing analysis, we conclude that the agency acted properly in declining to afford appellant restoration rights.

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row holding in this Opinion and Order should not be interpreted to condone a policy or legal requirement that an employee or applicant for employment possess an honorable discharge. We merely conclude that on the facts of this case appellant's inaction for 5 years to have his discharge upgraded precluded the interpretation made by the presiding official.

It is the judgment of the Board that appellant was not entitled to restoration to his former position with the agency. Accordingly, upon reconsideration, the appeal is DISMISSED.

This is the final decision of the Board.

Appellant is hereby notified of his right to file a civil action in an appropriate circuit of the U.S. Court of Appeals or the Court of Claims within thirty (30) days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 8, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ANTHONY T. PEZZA
v.
DEPARTMENT OF HEALTH AND
HUMAN SERVICES

Docket No.
NY075209014

OPINION AND ORDER

The Social Security Administration, Department of Health and Human Services, Jersey City, New Jersey, reduced the salary of Administrative Assistant Anthony T. Pezza from GS-12, Step 7, to GS-12, Step 6, effective June 29, 1979, by cancelling a Quality Step Increase (QSI) originally awarded on July 6, 1975. Mr. Pezza filed an appeal with the New York Field Office of the Merit Systems Protection Board. The presiding official reversed the appellant's reduction in salary in an initial decision issued on October 26, 1979, and the agency petitioned for review of that decision by the Board.

I. BACKGROUND

On July 6, 1975, the appellant received a QSI based on the recommendation of the agency's district manager concerning the appellant's performance for the period from April 28, 1974, to May 13, 1975. During that period, his official position was that of Administrative Assistant, GS-105-12, but from January 27, 1975, to August 28, 1976, he performed the duties of the temporarily vacant position of Assistant District Manager, GS-105-13.

By letter dated December 11, 1978, the appellant was notified by the agency's regional personnel officer that based on Comptroller General Decision B-183086, 56 Comp. Gen. 427 (1977), and 5 C.F.R. 550, Subpart H (1978), he had been awarded a retroactive temporary promotion and back pay at level GS-13 for the period from May 27, 1975, through August 28, 1976, in order to "document his performance of duties as Acting Assistant District Manager in the Jersey City District Office" and to "promote the efficiency of the service." The Comptroller General had decided that an employee detailed to a higher grade position for more than 120 days, without the former Civil Service Commission's approval, was entitled to a retroactive temporary promotion from the 121st day of the detail until the detail was terminated. The appellant's retroactive temporary promotion was initiated by the agency at the request of the former Civil Service Commission in response to a Congressional inquiry prompted by the appellant's claim that his performance was not being recognized by the agency. The appellant had informed the agency, however, that he did not wish to file a claim for the retroactive temporary promotion and back pay.

By letter dated April 10, 1979, the agency's area director notified the appellant of the proposed rescission of the appellant's July 6, 1975, QSI ". . . because it was contrary to established policy in that it was proposed after the start of a detail." The letter explained further:

> Employees may not be granted QSIs while they are performing temporary assignments such as under overlong details. The requirement is that quality increases may only be granted in connection with sustained high quality performance in the employee's regular position.

Despite the appellant's written arguments to the contrary, the agency finalized the proposed action, effective June 29, 1979.

In the initial decision, the presiding official found that the appellant's July 6, 1975, QSI and the retroactive temporary promotion had both been properly granted, and that there was no justification for adjusting the former based on the latter. The presiding official concluded, therefore, that the agency failed to establish that its reduction in the appellant's pay promoted the efficiency of the service, and ordered the action cancelled.

II. ISSUES FOR REVIEW

The agency petitioned for review of the initial decision on the basis that the presiding official erroneously interpreted statute or regulation. The agency noted that 5 U.S.C. 5336 mandates that a QSI be awarded only ". . . in recognition of high quality performance above that ordinarily found in the type of position concerned." Since the appellant functioned officially as Acting Assistant District Manager as a result of his retroactive temporary promotion, the agency asserted, the award of the QSI to the appellant for his performance as an Administrative Assistant was contrary to law. The agency contended that all of the facts of this case must be viewed retrospectively in light of the retroactive temporary promotion, and that the presiding official's finding that the QSI was proper, because it was appropriate when recommended and granted, is "a strained interpretation of law and regulation." The agency argued, further, that "(t)he efficiency of the Federal Service is always promoted when the agency acts consistently in upholding every law and regulation."

In his response to the agency's petition, the appellant noted that the QSI at issue was in fact granted for his performance as an Administrative Assistant, not as Acting Assistant District Manager, and that the agency still failed to establish how cancelling his July 6, 1975, QSI could promote the efficiency of the service.

III. DISCUSSION

The Civil Service Reform Act of 1978 provides that an agency may reduce the pay of an employee like the appellant ". . . only for such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). Such an adverse action promotes the efficiency of the service when the grounds therefor relate to ". . . either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate government interest. . . ," *Doe v. Hampton*, 556 F.2d 265, 272 (D.C. Cir. 1977), *quoted in McClelland v. Andrus*, 606 F.2d 1278, 1291 (D.C. Cir. 1980). The agency's final notice of reduction in pay specifies that "(t)his action is not intended, nor is it to be construed by you, as an adverse reflection upon your performance in the grade you now hold or the grade to which you were retroactively temporarily promoted. . . ." The reduction in pay must, therefore, advance some other "legitimate government interest" in order to promote the efficiency of the service.

The agency contended in its petition for review that permitting the appellant to retain the QSI would constitute "extra pay" not specifically authorized by law, because the appellant was retroactively promoted to another position for the period for which the QSI was granted. This, argued the agency, would violate 5 U.S.C. 5536, which provides:

> An employee . . . whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for additional pay or allowance.

The Board finds this argument unpersuasive. Logically, in light of the retroactive temporary promotion, the appellant's back pay award would be adjusted to compensate him solely on the basis of his appointment to the position of Acting Assistant District Manager. The effect of the QSI would be suspended until the appellant's temporary promotion terminated and he returned to his position as an Administrative Assistant.

The agency asserted further in its petition that permitting the appellant to retain the QSI would violate 5 U.S.C. 5596(b), which provides:

> An employee . . . affected by an unjustified or unwarranted personnel action . . . is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect . . . an amount equal to all or any part of the pay . . . which the employee *normally* would have earned or received during the period if the personnel action had not occurred, less any amounts earned by the employee through other employment during that period. (Emphasis added by the agency.)

However, the same logic set forth above would apply if the agency's failure to promote the appellant temporarily, at the time he actually functioned as Acting Assistant District Manager, is deemed to be the "unjustified or unwarranted personnel action." In other words, the appellant should be compensated at the Acting Assistant District Manager pay level for the term of his temporary promotion, and at the Administrative Assistant level taking the QSI into account thereafter.

The record on appeal contains a relevant agency memorandum not mentioned by either party. Apparently issued in April of 1978 by the agency's director of personnel to regional personnel officers, the memorandum states:

> Employees may not be granted QSIs while they are performing temporary assignments such as under these overlong details. The requirement is that quality increases may only be granted in connection with sustained high quality performance in the employee's regular position. Thus, personnel offices must initiate action to withdraw *any* QSIs effected during any of the term of an overlong detail (i.e., those that run beyond 120 days) and must make appropriate pay adjustment.
>
> For certain of these affected employees, it may be proper to effect their QSI at the time they are returned to their permanent, lower grade position, specifically, when personnel offices can establish through appropriate official records that employees were recommended for a QSI before the start of the detail but the QSI was not effected until after the detail commenced, the employees in this specific situation are entitled to have their QSI effected upon return to lower grade. In these cases, personnel offices must still initiate action to withdraw the QSIs for the term of the detail, make other appropriate pay adjustments, and then take action to effect the QSIs at the beginning of the pay period on or after the date the employees are returned to lower grade.

This statement of agency policy is consistent with the requirement of 5 U.S.C. 5336 that a QSI be awarded only ". . . in recognition of high performance above that ordinarily found in the type of position concerned."

Applying that policy to the appellant's circumstances, the Board notes that the appellant was never formally detailed to the position of Acting Assistant District Manager until the effective date of the retroactive temporary promotion. He simply performed those functions, in addition to those of his own Administrative Assistant position, as he had done in the past in the absence of an Assistant District Manager. It could be argued that the appellant was serving an unofficial "overlong detail" at the time he was recommended for the QSI, because he was performing the Assistant District Manager's duties at that time. However, the retroactive temporary promotion did not alter the fact that the detail remained unofficial until the effective date of the retroactive temporary promotion. Since the QSI was recommended on May 13, 1975, before the term of the retroactive temporary promotion began on May 27, 1975, the policy statement of the agency's director of personnel, quoted above, supports the withdrawal of the appellant's QSI only for the term of the temporary promotion.

Giving retroactive official status to the first 120 days of the appellant's unofficial overlong detail, which the agency did not expressly attempt to do in awarding the retroactive temporary promotion, could result in a cancellation of the appellant's QSI under the agency's stated administrative policy. The Board finds, however, that this unfair result would not promote the efficiency of the service. It advances no legitimate government interest to attempt to correct an administrative inequity if it results in a further inequity. The agency's effort to provide the appellant with a retroactive temporary promotion, in recognition of his performance of important duties in addition to his own over a prolonged period, would obviously be diminished in effect if the retroactive temporary promotion were to invalidate a QSI recommended before the temporary promotion retroactively began. The Board agrees, therefore, with the presiding official's conclusion that there was no administrative error with respect to the QSI that required correction.

Accordingly, the petition for review of the initial decision dated October 26, 1979, is GRANTED and that decision is AFFIRMED. The agency is hereby ORDERED to cancel its action reducing the appellant's pay from GS-12, Step 7, to GS-12, Step 6, and to furnish the New York Field Office of the Board a copy of the official Notification of Personnel Action documenting compliance with this order of the Board within ten calendar days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 8, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

E. ARTHUR PATTERSON
v.
DEPARTMENT OF THE INTERIOR

Docket No.
SE035199001

This appeal is REOPENED and REMANDED.

Appellant is a former Department of Interior, Bureau of Indian Affairs, Regional Economist who was separated by reduction-in-force procedures. The Department of Interior advised appellant, whose duty station and residence were in Anchorage, Alaska, that he could inspect the records relating to his reduction-in-force in Juneau, Alaska. Juneau and Anchorage are not nearby cities, and appellant's only practicable means for traveling between the two is by airplane or coastal steamer.

Appellant did not travel to Juneau and he did not have the opportunity to review his records in Anchorage until they were transmitted there for his hearing.

The Department of Interior should have made appellant's records available to him at the city where he worked and lived, Anchorage, in time to allow him a sufficient opportunity to use them for preparing a defense. It is not clear from the record, however, whether by not having the records available in a timely manner, his ability to prepare was actually harmed.

Accordingly, this appeal is REMANDED and the presiding official, upon receipt of the case, shall order the Department of Interior to make appellant's complete file available to him in Anchorage, or wherever he is presently living, and shall give him a reasonable time, after receipt of the records, to present arguments on whether the Department of Interior's failure to make the records available to him in Anchorage until the time of his hearing harmed his ability to prepare a defense.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 11, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARGARET H. CHANDLER
v.
INTERSTATE COMMERCE COMMISSION

Docket No.
DC315H99212

OPINION AND ORDER

Appellant, Margaret H. Chandler, was terminated effective May 18, 1979, by the respondent agency, Interstate Commerce Commission (ICC). The agency's reason for the termination was poor performance during appellant's probationary period.

Appellant was competitively appointed from a certificate of eligibles on July 7, 1978, to a position of Auditor, GS-12. Prior to the appointment, appellant had been employed by another federal agency in a position in the excepted service. Appellant's appeal was dismissed by the field office based on a finding that the Board lacked jurisdiction to consider it.

In the petition for review appellant reasserted the arguments considered by the field office. She argued that her prior excepted service satisfied some or all of the probationary period, and therefore she is not excluded from the rights afforded "employees" under 5 U.S.C. 7511. She also contended that 5 U.S.C. 7702(a) (2) provides a separate basis for jurisdiction.

An "employee", for purposes of Chapter 75, Subchapter II, Title 5 of the U.S. Code, is "an individual in the competitive service who is not serving a probationary . . . period under an initial appointment. . . ." 5 U.S.C. 7511(a) (1) (A). In this case, because appellant was appointed from a certificate of eligibles in accordance with 5 C.F.R. 315.801(a) (1), her first year of service with the agency was properly in a probationary status. *Marcus v. United States*, 473 F.2d 896 (Ct.Cl. 1973). Her service in a previous position in the excepted service did not alter the required probationary period for the competitive appointment.

Appellant argued that there exists an independent basis for jurisdiction because she was the victim of a prohibited personnel practice contrary to 5 U.S.C. 2302, and the ICC did not resolve her complaints of sex discrimination within 120 days. We find this assertion unsupportable. 5 U.S.C. 7702 provides that the Board may hear an allegation of discrimination in connection with a matter which, absent that allegation, is appealable to the Board. 5 U.S.C. 2302 sets forth prohibited personnel practices which may provide a basis for the Board's jurisdiction only if the matter is

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brought before the Board on a complaint by the Special Counsel. Neither section of the statute provides an independent basis for jurisdiction. *See Wren v. Department of the Army*, 2 MSPB 174 (1980). Further, the fact that an agency may have failed to resolve a complaint of discrimination within 120 days is of no effect unless the subject of that complaint would have been appealable to the Board. Since we have found that it is not, we further find that the termination did not become appealable solely as a result of the alleged prohibited personnel practice or complaint of discrimination.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review may be filed in the appropriate circuit of the U.S. Court of Appeals or the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 12, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILMA R. COFER
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DC315H09013

OPINION AND ORDER

Appellant, Wilma R. Cofer, was separated from her position effective June 13, 1979. The agency asserted that appellant had resigned, but she appealed to the Board alleging that the separation was involuntary. Without deciding this issue, the presiding official, after a hearing, dismissed the case because appellant was a probationary employee who had no right of appeal to the Board regardless of the nature of the separation.

The appellant petitioned the Board to review the initial decision. In the petition, appellant did not assert or establish that the decision was based on an erroneous interpretation of statute or regulation or that there was new and material evidence now available which was not previously available despite due diligence. 5 C.F.R. 1201.115. The Board finds no error in the initial decision. Accordingly, the petition for review is denied.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 12, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM C. JACKSON
v.
U.S. DEPARTMENT OF AGRICULTURE

Docket No.
SF315H99001

OPINION AND ORDER

Petitioner was terminated during the probationary period of his career-conditional appointment with the U.S. Department of Agriculture, Forest Service, Los Padres National Forest, Goleta, California. He appealed to the San Francisco Field Office of the Board alleging merely "discrimination" without further specification.

On appeal, the presiding official found that the only right of appeal by a probationary employee terminated for post-appointment reasons was conferred by interim regulations 5 C.F.R. 315.804 [1] and 5 C.F.R. 315.806(b), which provided for appeals of a termination which the probationer alleged was based on partisan political reasons or marital status. He concluded that, since petitioner made no such allegations, the Board had no jurisdiction over the appeal. Petitioner now seeks review of that decision.

In response to the petition for review, the agency asserted that petitioner was terminated for "unsatisfactory production level, low quality of work and poor attitude" and that since petitioner did not allege that his termination was effected due to discrimination based on partisan political reasons or marital status, the initial decision should be allowed to stand.

Under 5 U.S.C. 7511(a), probationary employees are specifically excluded from those classes of persons entitled to appeal removal actions to the Board. Hence, petitioner, as a probationary employee, has no statutory right to appeal his termination to the Board.

The Board's statutory jurisdiction in cases involving allegations of discrimination is limited to those types of discrimination set forth in 5 U.S.C. 7702(a)(1)(B), where such allegations are made in connection with a matter otherwise appealable to the Board. As probationers have no statutory right of appeal to the Board, the Board has no jurisdiction over allegations by probationers of discrimination of the types specified in 5 U.S.C. 7702(a)

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[1] The above reference appears to be an inadvertent error in citation, inasmuch as that section refers to termination actions taken because of reasons which pre-date the employee's appointment.

(1) (B). Hence, to the extent that section 315.806 of Title 5, Code of Federal Regulations, as it was republished in January 1979, confers upon probationers an independent right of appeal to the Board based on allegations of the same types of discrimination set forth in 5 U.S.C. 7702 (a) (1) (B), that regulation is inconsistent with law. *See* 5 U.S.C. 907 (a). The Office of Personnel Management subsequently corrected this error. *See* 44 F.R. 48951-48952 (August 21, 1979).

The only right of a probationary employee to appeal allegations of discrimination to the Board is conferred by 5 C.F.R. 315.806 (b), which requires that such allegations of discrimination be based on partisan political reasons or on marital status. *See* 5 C.F.R. 720.901 (b) which prohibits taking termination actions based on those reasons. No such allegations were made by petitioner to the presiding official. While he made a bare allegation, in the petition for review, that his termination was due to "partisan politics against me," petitioner neither stated why he failed to raise this contention to the presiding official in a timely manner nor gave any specificity to his assertion. Therefore, the field office was without jurisdiction to entertain the appeal, as the presiding official properly concluded, and for this and all the foregoing reasons, the petition does not meet the criteria for review set forth in 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the United States Court of Appeals or the United States Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 12, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES L. BROWN	
v.	Docket No.
UNITED STATES POSTAL SERVICE	SE075209003

OPINION AND ORDER

Appellant was removed from his position with the United States Postal Service, effective June 25, 1979, for falsifying information on his employment application. Specifically, in response to a question concerning convictions, appellant falsely stated that he had never been convicted by a special or general court martial while in the military service. Appellant also responded negatively to a question whether he had been convicted of a legal offense, excluding juvenile offenses or traffic violations with a fine of $30.00 or less.

In removing appellant, the Postal Service maintained that the appellant was named in connection with seven offenses by the Chief of Police in Charlotte, North Carolnia. These offenses included speeding, public drunkenness, trespassing, resisting arrest and driving while intoxicated. In the initial decision, the presiding official, noting that there was no record of the disposition of these offenses, found that the Postal Service did not prove by the preponderance of the evidence that the appellant had falsified his employment application. However, in reference to a conviction by a special or general court martial while in the military service, the presiding official determined that the agency proved by a preponderance of the evidence that appellant was convicted by a special court martial. Through agency documentation, it was demonstrated that appellant was discharged from the Army by administrative action in lieu of court martial. The recommendation for discharge, however, listed appellant's disciplinary history, including a notation of the special court martial dated January 19, 1970, as a result of which he was reduced in grade, fined, and given a suspended sentence at hard labor. The appellant offered no refutation of the veracity of the described documents.

The presiding official noted that the term "falsification" had not been further defined in the notice of proposed removal, but that the record indicated that the agency intended to charge appellant with *intentional* falsification. In light of the above documentation, the presiding official sustained the agency charge, "Falsification of

Employment Application." The presiding official also found the removal of appellant to be in accord with established policy since the employment application gave a clear warning that a false answer could result in dismissal of the applicant from his position. Accordingly the presiding official found the removal action to be for such cause as promotes the efficiency of the service, and affirmed it.

Upon review of appellant's petition for review, the Board finds that it fails to meet either of the criteria for review by the Board as set forth in 5 C.F.R. 1201.115. Indeed, the petition initially stated that the presiding official's decision was fair. The petition merely stated that the decision reflected wrong dates, false information and other errors without specifying which information was wrong or how this allegation was true. The petition next asked for the source of the presiding official's information. In reviewing the file, the Board notes that all of the information on which the presiding official relied was supplied by the appellant and by the agency. The agency submitted certified documents which were furnished to the appellant before the decision was issued.

In his petition, appellant made no attempt to refute the presiding official's findings with new and material evidence that could not have been obtained when the record was closed, nor did he argue that the presiding official erred in interpreting statutory or case law.

Accordingly appellant's petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 15, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN A. CERASO
v.
U.S. DEPARTMENT OF THE ARMY

Docket No.
AT315H99026

OPINION AND ORDER

John A. Ceraso, appellant, was discharged from his employment with the Department of the Army, Corps of Engineers, and appealed the termination to the Board's Atlanta Field Office. The presiding official concluded that the Board did not have jurisdiction since appellant was terminated during his probationary period for reasons arising after his appointment. As no allegation was raised that the action was taken because of partisan political reasons or marital status, the appeal was dismissed. The appellant then petitioned the Board to review the initial decision.

In the petition appellant asserted that he was fired while he was on leave due to a work-related injury, and he believes that he was fired because of whistle blowing. He did not allege any specific facts in this regard.

The issue in this case is whether appellant, as a probationary employee, has a right to appeal his termination to the Board based on the allegations he has made.

Cases which involve allegations of discrimination, as in this case, are within the Board's jurisdiction if the appellant has been affected by an action which is otherwise appealable to the Board. 5 U.S.C. 7701(a)(1)(A).[1] This provision is in accordance with Reorganization Plan No. 1 of 1978, which transferred authority for enforcement of equal employment rights to the Equal Employment Opportunity Commission.

Since petitioner was a probationary employee, he was not an "employee" entitled to the statutory rights, including the right of appeal, contained in Chapter 75, Subchapter II, Title 5 of the U.S. Code. 5 U.S.C. 7511(a)(1). A regulatory exception exists, however, when a probationary employee alleges that a termination was due to discrimination based on partisan political reasons or marital status, or for conditions arising before appointment to the position in question. 5 C.F.R. 315.806(b) and (c), as amended, 44 Fed. Reg. 48951 (August 21, 1979).

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[1] This provision applies to allegations of discrimination based on race, color, religion, sex, national origin, age or handicapped status.

Therefore, since petitioner was terminated during his probationary period, and since he did not allege a ground for appeal provided in 5 C.F.R. 315.806(b) or (c), the matter is not appealable to the Board, and was properly dismissed. The allegation of a prohibited personnel practice is also insufficient to vest appellate jurisdiction in the Board. See *Wren v. Department of the Army,* 2 MSPB 174 (1980).

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 15, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD S. JONES
v.
VETERANS ADMINISTRATION

Docket No.
PH075209025

OPINION AND ORDER

Petitioner was discharged by the Veterans Administration based on allegations of patient abuse. After a hearing before the presiding official of the Board's Philadelphia Field Office, the agency action was affirmed. Petitioner requested the Board to review the initial decision.

In the petition for review, petitioner alleged that the decision of the presiding official was based on an erroneous interpretation of statute or regulation, and that it is arbitrary, capricious and unreasonable. The latter contention is based upon petitioner's reading of a decision issued by the Appeals Review Board of the Civil Service Commission.

Petitioner's first contention, that the decision was based on erroneous statutory or regulatory interpretation, is one of the criteria which, if established, would warrant the Board's review of an initial decision. 5 C.F.R. 1201.115(b). Beyond the mere allegation, however, no error is specified as a basis for invoking the Board's review authority, and we find none apparent in the well-reasoned decision of the presiding official. While petitioner has taken issue with certain factual determinations, we find that he has not "identified any internal inconsistencies or inherent improbability" nor presented a "specification of evidence or reasons warranting a review" of the initial decision. See *Weaver v. Department of Navy,* 2 MSPB 297 (1980).

Petitioner's reliance on the cited Civil Service Commission case is misplaced. The cited case simply found that an agency's decision on the penalty imposed on an employee was discretionary and would not be reviewed unless it were found to be arbitrary and capricious. Decisions of the Board's predecessor organization are not binding on the Board. Further, that case in no way supports a finding that either of the criteria for review of this case is established, or that the instant action does not promote the efficiency of the service, which is the applicable statutory standard. 5 U.S.C. 7513. Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. court of appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 15, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWIN C. WRIGHT, JR.
v.
U.S. DEPARTMENT OF THE NAVY

Docket No.
DC531D99007

OPINION AND ORDER

The appellant filed an appeal with the Board's Washington, D.C. Field Office from the reconsideration decision of the Department of the Navy, denying his within-grade salary increase.

On September 12, 1979, the presiding official issued a ten page initial decision containing a complete finding of facts and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact and law presented on the record. *See* 5 C.F.R. 1201.111(a). The presiding official found that 5 U.S.C. 7701(c)(1)(B) required that the agency's denial of a within-grade salary increase be supported by a preponderance of the evidence.[1] Applying this evidentiary standard, the presiding official found that the record evidence supported the four reasons relied on by the agency for the denial. The presiding official also found that appellant's satisfactory performance rating by the agency's Performance Rating Board of Review was not sufficient to establish that his performance was at an acceptable level of competence, and finally, that the agency complied with all applicable regulations in reaching its decision that his level of competence was not acceptable.[2] The presiding official sustained the agency's reconsideration decision denying the appellant's within-grade salary increase.

The appellant *pro se* timely filed a petition for review in which he alleged that the agency had not "provided substantial, or a preponderance of, evidence to show that my performance failed to meet established standards in one or more critical elements of my position." The petition re-examined the evidence adduced at the Field Office hearing and attempted to refute the presiding official's unfavorable findings of fact and conclusions, while also asserting that the findings of the presiding official on some issues which he found the agency had not sustained constitute a basis for review of the agency's action by the Board. The agency, in its response, asserted that the petition for review is merely an analysis of the presiding official's initial decision in an attempt to refute the sufficiency of the evidence supporting his findings and, hence, does not meet the Board's regulatory criteria for review.

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[1] The Board subsequently held in *Parker v. Defense Logistics Agency*, 1 MSPB 489, 500 (1980), that an agency's negative acceptable level of competence determination need only be supported by substantial evidence under 5 U.S.C. 7701(c)(1)(A). The Board perceives no harmful error in the finding of the presiding official that the agency sustained its decision by a greater burden of proof than it was required to do.

[2] The March 24, 1979, written notification to the appellant that the agency had determined that his performance for the waiting period was not of an acceptable level of competence was based upon deficiencies listed in a letter proposing the appellant's removal issued on November 26, 1978. The transcript of the hearing in the instant appeal on July 26, 1979, reveals that the agency had effected the appellant's removal by that date.

The Board may grant a petition for review when it is established that new and material evidence is available that, despite due diligence, was not available when the record was closed, or that the decision of the presiding official is based on an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115. The appellant's petition for review neither establishes that new and material evidence is now available that was not available when the record was closed, nor that the presiding official's decision is based on an erroneous interpretation of statute or regulation. The appellant's allegations of factual error relate to a credibility determination of the veracity and accuracy of the testimony of the witnesses, and due deference must be given to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses. *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980). The petition for review does not establish that the initial decision of the presiding official is based on a harmfully erroneous interpretation or application of the statutory or regulatory requirements regarding the weight of the evidence. *Id.* at 300.

Accordingly, the petition for review of the initial decision of the presiding official is DENIED for failure to meet the regulatory criteria for review.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 15, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RAYMOND C. BRADLEY
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075209143

OPINION AND ORDER

By petition under 5 C.F.R. 1201.115 (1979), Raymond C. Bradley, appellant, seeks Board review of the initial decision issued on March 21, 1980, which dismissed his appeal without prejudice.

On November 2, 1979, the agency notified appellant that he would be suspended for 19 calendar days effective January 2, 1980. On December 20, 1979, the appellant filed a formal complaint of discrimination within his agency, and on January 11, 1980, he filed a petition for appeal to the Board's San Francisco Field Office, raising some of the same issues presented in the discrimination complaint. In the initial decision of March 21, 1980, the presiding official found that the appeal was prematurely filed because appellant had filed a discrimination complaint within the agency on the appealable matter, the agency had not issued a decision on the complaint, and 120 days from the date of the complaint had not elapsed.

The presiding official's disposition of the case was correct. When a discrimination complaint concerning an appealable matter is filed within an agency, and the complainant subsequently files an appeal with the Board before the issuance of an agency decision or the lapse of 120 days from the date of the complaint, 5 U.S.C. 7702 and 5 C.F.R. 1201.154 (1979) require dismissal of that appeal. *Lewis v. Internal Revenue Service*, 2 MSPB 181 (1980). Because such appeals are dismissed without prejudice to a new, timely filing, there is no inequity in this procedure. It also serves to conserve judicial resources in the event the agency effects a resolution of the matter acceptable to the complainant within 120 days.

Accordingly, the petition for review is DENIED.

After a dismissal without prejudice resulting from a premature appeal such as occurred here, an appellant must wait until the issuance of an agency decision or the passage of the 120-day period, whichever occurs first, before refiling a timely appeal with the Board. Since more than 120 days from the filing of the discrimination complaint have now elapsed, appellant is advised that he may file an appeal with the Field Office if the agency has not yet issued a decision on the discrimination complaint.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 16, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CARL H. ANDERSON
v.
VETERANS ADMINISTRATION

Docket No.
SL075299018

OPINION AND ORDER

The initial decision of the presiding official affirmed the agency's decision to remove the appellant from his position at the Veterans Administration Hospital as a police officer. The agency cited sixteen lettered specifications of incidents which demonstrated bizarre and irrational behavior by appellant supporting the agency's charge that appellant was not emotionally and mentally qualified to retain his position. The presiding official found that the charges leveled against the appellant and the agency action of removal were sustained by a preponderance of the evidence of record under 5 U.S.C. Section 7701(c)(1)(B) (Supp. II 1978). Although appellant and his attorney were afforded the opportunity at the hearing to examine appellant's accusers, appellant's attorney chose not to call them. Finally, in weighing the credibility of appellant's assertions against those of his co-workers, the presiding official stated that the collective reports of the employees, all of which described bizarre, irrational behavior on appellant's part, undermined appellant's credibility and afforded appellant's accusers a high degree of credibility.

Finding that the sixteen specifications were supported by a preponderance of the evidence, the presiding official decided that the removal of appellant was an appropriate action to promote the efficiency of the service under 5 U.S.C. Section 7513 (Supp. II 1978).

The presiding official also dismissed appellant's affirmative defense that he was "hounded" out of his job by agency officials. The presiding official stated that agency efforts to develop evidence of an employee's fitness for duty are not "hounding" actions absent evidence to that effect. The assertion of appellant's attorney that the reports from fellow employees concerning appellant's behavior were solicited and not volunteered was not sustained. The presiding official decided that this assertion was unsubstantiated since the appellant's attorney never examined or called any of the co-workers to testify concerning the substance of their reports and the circumstances under which they were prepared. Moreover, the presiding official concluded that it is the credibility and not the voluntariness of the co-workers' reports that is important.

The presiding official dismissed the argument of appellant's attorney that various medical reports from Drs. Dunner, Kuhl, and Kennedy should not have been relied upon since these doctors never physically examined appellant. The presiding official pointed out that the only medical report relied on by the agency in removing appellant was the psychological assessment by Dr. C. G. Wellso, who did examine appellant in March 1979. Further, the agency only minimally relied on Dr. Wellso's psychological assessment. The presiding official found that the agency presented a strong case for removing appellant through the sixteen specifications, even in the absence of any medical report.

In appellant's *pro se* petition for review, he disputed the evidence of record and asserted that the employees who complained about him were lying because they feared that appellant would expose their shortcomings. As a basis for this assertion, appellant cited as "new evidence" three incidents that took place during his employment as a police officer at the Veterans Administration Medical Center involving hospital personnel. Appellant argued that his knowledge of these three incidents was the reason why he was removed.

Appellant next complained that Dr. Kuhl, called as a witness at the hearing, never examined him and that his testimony should not be relied upon. Appellant also argued as a basis for his petition that the V.A. Medical Center in Iowa is discriminatory toward veterans as patients and employees Appellant further maintained that the V.A. Medical Center practices discrimination along religious and national origin lines. Appellant, however, did not mention which religion or which ethnic group is the alleged target of the discrimination, nor did he give examples of how he, individually, was discriminated against.

Upon examination of appellant's petition, the Board finds that it has not met any of the criteria for review by the Board as set forth in 5 C.F.R. 1201.115 (1979). Appellant failed to cite new and material evidence that was unavailable when the record was closed. As stated in his petition, appellant had knowledge of the three named incidents at the time of his hearing since they had allegedly occurred when he was employed at the V.A. hospital. Moreover, it is noteworthy that appellant had the opportunity to call and examine his accusers at his hearing and bring up these incidents but chose not to do so.

Appellant's argument that Dr. Kuhl's testimony should not have been relied upon is rendered meaningless by the agency's and presiding official's decisions that dismissed all medical evidence except Dr. Wellso's report.

Appellant's assertion of discrimination, brought up for the first time in his petition for review, cannot be characterized as new evidence. Moreover, appellant's allegation of discrimination fails to comply with the 5 C.F.R. 1201.153 (1979) requirement that there be provided a statement giving specific examples of how the appellant was discriminated against. Appellant's petition fails to state whether he filed a discrimination complaint or grievance with his agency or any other agency as required by 5 C.F.R. 1201.153(a) (1979). Appellant's discrimination charge also fails to meet the timely filing requirements of 5 C.F.R. section 1201.154 (1979). An appellant may raise an allegation of discrimination at any time during the Board's consideration of the appeal of the agency's action if the appellant did not know of the existence of a basis for the allegation at the time the petition for appeal was filed. Appellant herein never asserted, however that he had no knowledge of the basis for the allegation. Therefore, appellant's allegation of discrimination is not reviewable by the Board. 5 C.F.R. section 1201.155 (1979).

Finally, the appellant never alleged that the decision of the presiding official was based on an erroneous interpretation of statute or regulation. The Board finds that upon a careful and thorough analysis, the presiding official decided that the agency's decision was supported by a preponderance of the evidence. This is the proper degree of proof under 5 U.S.C. section 7701(c)(1)(B) (Supp. II 1978) and 5 C.F.R. 1201.56(c)(2) (1979). Thus, the Board finds no basis for disagreement with the presiding official's initial decision and concludes that there is no basis on which to reopen the case.

Accordingly, appellant's petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MIKE COCCIARDI, JR.
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DA075209031

OPINION AND ORDER

The appellant, Supervisory Management Assistant, GS-344-9, was offered reassignment to the position of Management Analyst, GS-343-9 because the position he held had been reclassified GS-344-8 to correct a classification error. He declined the offer of reassignment and the agency reduced his grade and pay to GS-344-8, at which his position is now classified.

The appellant appealed to the Dallas Field Office, protesting the propriety of the reclassification action. In the initial decision, the presiding official dismissed the appeal as not being within the purview of the appellate jurisdiction of the Merit Systems Protection Board (the Board).

In his petition for review, the appellant asserted that the presiding official's decision was erroneous and that the agency action was within the Board's jurisdiction. The agency did not respond to the petition for review.

The appellant admits that the actions taken under 5 U.S.C. 5362 and 5 U.S.C. 5363 to terminate his grade and pay retention are excluded from Chapter 75 of Title 5, which covers adverse actions. However, he argues that the agency action is appealable as a reduction in grade and reduction in pay under 5 U.S.C. 7512(3) (4) because the agency misapplied the laws, rules, and regulations which resulted in his downgrade.

Under the Civil Service Reform Act, the appellant was entitled to and declined to accept, pay retention benefits. 5 U.S.C. 5316 *et seq.* In a recent decision, the Board held that "(a)n action which is the basis for entitlement to grade and pay retention benefits may be appealed only to the Office of Personnel Management under 5 U.S.C. 5112(b) or 5346(c). 5 U.S.C. 5366(a) (2). Such action is not appealable under any other appeal procedures. 5 U.S.C. 5366(b) (1)". *Walter Lew, et al. v. Department of the Treasury,* 3 MSPB 53 (1980). (Footnote omitted).

Therefore, the reclassification of appellant's position is not appealable to the Board under 5 U.S.C. 7701.

Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellants are hereby notified of their right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HOVIES M. DILLAHUNT
v.
DEPARTMENT OF THE NAVY

Docket No.
AT315H99025

OPINION AND ORDER

Appellant's employment was terminated during his probationary period on the basis of unsatisfactory performance. He thereafter filed a timely appeal with the Board's Atlanta Field Office. The appeal was dismissed as not within the Board's appellate jurisdiction.

By petition dated January 14, 1980, appellant seeks Board review of the initial decision issued on August 22, 1979.

The Board's regulations require that petitions for review be filed within 35 days of the issuance of an initial decision. 5 C.F.R. 1201.114(b) (1979). The initial decision in this case informed appellant of the right to file a petition for review and the time within which the petition had to be filed. Despite this information, appellant's petition was dated January 14, 1980, and was received by the Office of the Secretary on January 18, 1980. The Board's regulations provide at 5 C.F.R. 1201.113(d) (1979) that the 35-day time limit for filing a petition may be extended for good cause shown. The Board, accordingly, provided appellant an opportunity to show good cause why the time limit for filing his petition should be extended. Appellant has not, however, responded to the Board's request.

In the absence of any explanation on the part of the appellant, the Board finds that appellant's petition for review was untimely filed and that he has not shown good cause for extending the time limit for filing.

The petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board on this case. A petition for judicial review of this decision may be filed in the appropriate circuit of the United States Court of Appeals or in the United States Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

FLOYD N. DUGGER
v.
DEPARTMENT OF JUSTICE

Docket No.
NY075299039

OPINION AND ORDER

The decision of the presiding official in the above-styled case, issued August 16, 1979, is hereby REOPENED, REVERSED, AND REMANDED to the field office.

The case was dismissed by the presiding official under 5 C.F.R. 1201.154 on the ground that a complaint of discrimination was currently pending before the agency. However, appellant had initially appealed the 30-day suspension to the Board. The complaint of discrimination and charge of reprisal were subsequently filed with the agency.

5 U.S.C. 7702 and 5 C.F.R. 1201.154 provide an employee with the choice of proceeding before the agency on a discrimination complaint, invoking negotiated grievance procedures, or appealing directly to the Board. If an employee chooses initially to proceed before the agency on a complaint of discrimination, Section 1201.154(a) of the Board's regulations clearly provides that the Board cannot take jurisdiction over an appeal unless the agency has issued a final decision in the case, or 120 days have elapsed without the issuance of a decision. However, Section 1201.154(c) requires that an appellant "*either* file a timely complaint of discrimination with the agency *or* appeal to the Board within 20 days after the effective date of the agency action being appealed." (Emphasis added.) Therefore, any decision by an appellant to file a complaint of discrimination or charge of reprisal before the agency, subsequent to the filing of an appeal with the Board, does not delay the jurisdiction of the Board under 5 C.F.R. 1201.154.

Furthermore, 5 C.F.R. 1201.155 states, "An appellant may raise an allegation of discrimination at any time during the Board's consideration of the appeal of the agency's action, if the appellant did not know of the existence of a basis for the allegation at the time the petition for appeal was filed." This section further provides that in such cases, upon written agreement of the parties, the presiding official may remand the discrimination issue to the agency for consideration, if the presiding official determines that to do so would be in the interests of justice.

This section indicates that even when an appellant is not initially aware of the discrimination, the Board will not surrender jurisdiction to an agency simply by the appellant's unilateral act of filing a complaint of discrimination with the agency. Therefore, in a case where an appellant was aware of discrimination, yet initially chose to bring his action before the Board, the Board need not delay its jurisdiction unless the parties agree that a remand to the agency is desirable, and the presiding official finds that a remand would be in the interests of justice. *See Cardenas v. U.S. Postal Service*, 1 MSPB 560 (1980).

Accordingly, the decision below to dismiss the appeal is REVERSED and the case is REMANDED to the Board's New York Field Office.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

STANLEY E. DUVALL
v.
NATIONAL INSTITUTES OF HEALTH

Docket No.
DC075209089

OPINION AND ORDER

Appellant was separated from his employment in the agency effective December 7, 1979. He filed a timely appeal to the Board's Washington Field Office, contending, *inter alia*, that his removal resulted from discrimination on account of his physical handicap. In the initial decision, the presiding official found that, as appellant had an excepted appointment and as he was not entitled to veterans preference, he was not a covered employee within the Board's adverse action jurisdiction. 5 U.S.C. 7511(a)(1). Accordingly, the appeal was dismissed as not presenting any matters within the purview of the Board's appellate jurisdiction.

In the petition for review, appellant's representative contends that the presiding official erred in that the initial decision failed to consider certain arguments which were submitted to him by letter dated January 31, 1980. Specifically, it is argued that the fact that appellant received an excepted appointment did not exclude him from the competitive service. Cited in support of this argument is Exec. Order No. 12125, dated March 15, 1979, as well as 5 U.S.C. 3302 and 3304(b).

In its response, the agency acknowledges that it could have recommended appellant for non-competitive conversion to the competitive service under the provisions of Exec. Order No. 12125. It asserts, however, that in view of the problems it encountered in keeping appellant fully occupied because of his limitations, it did not recommend such a conversion. As such, the agency argues that Exec. Order No. 12125 has no applicability to appellant's case.

The record before the Board is unclear in respect to whether the presiding official received the appellant's representative's letter of January 31, 1980, in time to consider the arguments presented therein in his initial decision of February 4, 1980. In any case, 5 U.S.C. 3302 and 3304(b) provide, respectively, that "(t)he President may prescribe rules governing the competitive service" and that "(a)n individual may be appointed in the competitive service if he . . . is specifically excepted from examination." Moreover, Exec. Order No. 12125 provides, in pertinent part: "Upon recommendation by the employing agency, and subject to such requirements as the Office of Personnel Management may prescribe, handicapped employees may acquire competitive status without competitive examination." 44 Fed. Reg. 16879 (1979) (to be codified in 5 C.F.R. 3.1). It is clear, then, that while Exec. Order No. 12125 allows for the conversion of certain handicapped employees who have been specifically excepted from examination, such conversion is discretionary and must be recommended by the employing agency.

In the instant case, there is no showing that appellant was ever converted to the competitive service. The evidence of record shows, to the contrary, that appellant was, in fact, still serving under an excepted appointment at the time of his separation. Accordingly, the appellant is not entitled to appeal his separation to the Board, and in the absence of an otherwise appealable matter, the Board lacks the jurisdiction to entertain his allegation of discrimination on account of physical handicap. 5 U.S.C. 7511(a)(1) and 7702.

The petition for review is therefore DENIED.

This is the final decision of the Merit Systems Protection Board in this case. The appellant is hereby informed of his right to file a civil action in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CLYDE W. MCGOWAN
v.
INTERNATIONAL COMMUNICATION AGENCY

Docket No.
DC075299048

OPINION AND ORDER

Appellant, by his representative, filed a petition for appeal with the Board's Washington, D.C. Field Office from the action of the International Communication Agency separating him from the agency by accepting his optional retirement submitted on April 23, 1979, effective April 24, 1979, as a GS-13 Production Officer. The agency had proposed appellant's removal from the agency effective April 24, 1979, on the grounds of his allegedly insubordinate refusal to accept various work assignments which were consistent with his position and grade. The agency accepted appellant's separation by optional retirement and discontinued the proposed removal action. The petition for appeal, which contested the merits of the proposed removal action, requested a hearing and alleged that the agency had engaged in racial discrimination against him since 1956.[1]

By letter of notice dated June 25, 1979, the presiding official informed the representatives of appellant and the agency that the hearing was set for August 2, 1979. On July 11, 1979, the agency filed a motion to dismiss appellant's appeal for lack of jurisdiction in the Board, asserting that appellant's voluntary retirement removed the case from the Board's review. On July 19, 1979, the agency also filed a request for continuance of the hearing set for August 2, 1979, in order to accommodate two of the agency's witnesses.[2] By letter dated July 23, 1979, the presiding official informed the parties that in order "to give full consideration" to the agency's motion to dismiss "and to allow the appellant a reasonable time in which to respond, if he so desires, I am hereby granting a continuance of the hearing. If the need arises, I will reschedule the hearing for a later date." No date for response was set, and appellant's representative failed to file any responsive pleading to the agency's motion to dismiss or to its request for a continuance.

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[1] The Board notes from the record that appellant's allegation of career long racial discrimination against him by the agency has been previously adjudicated and found not proven upon a hearing before an EEO examiner in 1973, and upon a civil action under 42 U.S.C. 2000e *et seq.*, as amended, before the U.S. District Court for the District of Columbia, Civil Action No. 73-1682, in 1977.

[2] Pursuant to 5 C.F.R. 1201.51, effective June 30, 1979, the motion should have been accompanied by an affidavit setting forth the reasons for the request. No procedural error was found by the presiding official and any error was harmless as the motion set forth the reasons for the request and appellant did not object to it.

On August 2, 1979, the date originally set for the hearing, the presiding official issued his initial decision, in which he found that because the agency's removal action was discontinued on the day of appellant's retirement, the retirement was the actual cause of his separation. The presiding official also found that appellant's retirement was not shown to be involuntary. The appeal, therefore, was dismissed for lack of jurisdiction, as appellant's separation was found not to be the result of an action by the agency. 5 U.S.C. 7512.

A petition for review dated August 21, 1979, was timely filed with the Board by appellant's representatives. The petition alleged that the presiding official's dismissal of the petition for appeal without an "opportunity to respond" was an erroneous interpretation of statute or regulation which denied appellant the opportunity to refute the agency's representations and to prove that his optional retirement was not voluntary but amounted to an adverse action. Appellant submitted with his petition for review a sworn affidavit in which he alleged that he was informed by several responsible agency personnel that he could exercise his option to retire and still appeal the removal action. The agency's responsive pleading, filed October 26, 1979, in pertinent part, argued that appellant's petition does not meet the criteria for review as his proffered evidence was available when the record was closed and that appellant was afforded ample opportunity to respond to the motion to dismiss before the presiding official made his ruling on the record.

The petition for review of the initial decision of the presiding official is GRANTED.

5 C.F.R. 1201.55(b), provides that "If a motion is made, in writing or orally, all other parties shall have an opportunity to object to it." In the instant appeal, the agency filed its motion to dismiss on July 11, 1979, and its motion for postponement on July 19, 1979. The presiding official granted the postponement on July 23, 1979, in order to consider fully the motion to dismiss and to allow appellant "a reasonable opportunity in which to respond." The presiding official then filed his initial decision on August 2, 1979, the day originally set for hearing.

The lack of a time limit or other guidelines for a party's exercise of the "opportunity to object" to a motion under 5 C.F.R. 1201.55(b), rests the issue of timeliness in the sound discretion of the presiding official. The presiding official should fix upon a reasonable time to respond to a motion under all of the circumstances of the particular case. A fair and reasonable amount of time must be afforded to a party to object to a motion particularly where, as here, no specific deadline was set and the grant of the agency's motion resulted in the adjudication of the appeal without a hearing. The Board finds that, under the circumstances of this case, the presiding official's decision to continue the hearing from August 2, 1979, to an unspecified future date, created the reasonable inference that he would make no decision on the case at least until after August 2, so as to afford appellant "an opportunity to object" to the agency's motion to dismiss. In fact, only ten days passed between the postponement and the issuance of the decision. The record shows that appellant's representative received the postponement notice two days after it was mailed.

It is well settled that due process should be utilized to protect a public employee's interest in his employment. *Jenkins v. Macy,* 357 F. 2d 62, 68 (8th Cir. 1966). Due process in administrative proceedings of a judicial nature generally requires conformance to fair practices of Anglo-Saxon jurisprudence. *Hornsby v. Allen,* 326 F. 2d 605, 608, *reh. denied,* 330 F. 2d 55 (5th Cir. 1964). Although administrative agencies such as the Board are not bound by the same details of procedure as the courts, they are governed by the same basic requirements of fairness and notice, including specificity of notice and opportunity to respond if what is instituted (the agency's motion to dismiss) is intended to be a procedure for summary disposition without a hearing. *Cf. Hess & Clark, Division of Rhodia, Inc. v. Food and Drug Administration,* 495 F. 2d 975, 984 (D.C. Cir. 1974). Under all of the circumstances of the instant appeal, although appellant was served with a copy of the agency's motion to dismiss three weeks prior to the issuance of the initial decision and failed to object to it, we find that the presiding official did not afford appellant fair notice of the deadline for his response, and that appellant was thereby denied a reasonable "opportunity to object" to the agency's motion under 5 C.F.R. 1201.55(b).

Appellant, therefore, should be permitted a specific opportunity to respond to the agency's motion to dismiss for lack of jurisdiction. 5 U.S.C. 7513(d) provides that a non-probationary competitive service employee, such as appellant, may appeal a "removal" as set forth in 5 U.S.C. 7512(1). As the presiding official acknowledged, an involuntary retirement, wrongfully coerced by an agency, has been recognized by the courts to be tantamount to such an adverse action. *Roskos v. United States*, 549 F. 2d 1386, 1389 (Ct. Cl. 1977). If appellant's response to the motion to dismiss raises non-frivolous allegations of the involuntariness of his separation from the agency, the issue has been held to warrant a hearing. *Spiegel v. Department of the Army*, 2 MSPB 307 (1980). *See Gratehouse v. United States*, 512 F. 2d 1104, 1108 (Ct. Cl. 1975); *McCormack v. United States*, 204 Ct. Cl. 371, 378 (1974); *Bell v. Groak*, 371 F. 2d 202, 204 (7th Cir. 1966); *Goodman v. United States*, 358 F. 2d 532, 533 (D.C. Cir. 1966); *Dabney v. Freeman*, 358 F. 2d 533, 535 (D.C. Cir. 1965).

Accordingly, the initial decision of the presiding official dated August 2, 1979, is VACATED in its findings of facts, REVERSED in its decision that appellant's petition for appeal be dismissed, and REMANDED to the Field Office for further proceedings in accordance with this Order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MELVIN MANNING v. DEPARTMENT OF JUSTICE	Docket No. SE075299005

OPINION AND ORDER

This appeal raises the issue of the propriety of an award of fees to the appellant's attorney by the Seattle Field Office of the Merit Systems Protection Board upon reversing the agency's dismissal of the appellant for malingering. The agency and the Office of Personnel Management (OPM) have petitioned for review of the award, asserting that it was erroneously made.

In his initial decision, the presiding official found that the agency's action dismissing the appellant was "capricious, arbitrary, and unreasonable" in light of the fact that the appellant had been recuperating from an on-the-job injury and was receiving workman's compensation during the time period in question. Initial Decision at 4. He concluded his decision with the ruling that ". . . the appellant is awarded appropriate attorney fees." *Id.*

The presiding official's award of fees was made in his initial decision pursuant to section 1201.37 of the Board's interim regulations, 44 Fed. Reg. 3949 (1979), upon the oral request of the appellant's attorney at the close of the hearing. Hearing Transcript at 69. The record contains no mention of a specific fee or the reasons for the amount of time spent by the appellant's attorney on this case.

Clearly the presiding official's order awarding attorney fees is erroneous in that it lacks any analysis of the statutory and regulatory requirements for such an award, set forth and examined in detail in our recent opinions in *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980), *O'Donnell v. Department of the Interior*, 2 MSPB 604 (1980), and *Kling v. Department of Justice*, 2 MSPB 620 (1980). *See* 5 U.S.C. 7701(g)(1) and 5 C.F.R. 1201.37(a). We find it unnecessary, at this time, to reach the subsidiary issues raised by the agency and OPM in their petitions because those issues have been resolved in *Allen*, *O'Donnell*, and *Kling*.

We decline to rule on the motion for fees upon review because the parties have not yet had an opportunity to address the issue fully in light of the guidelines set forth in *Allen, O'Donnell,* and *Kling,* and because we do not have the benefit of the insights and reasoning of the presiding official who heard and observed the witnesses, especially with regard to the "interest of justice" determination. Moreover, if the presiding official adheres to his view that an award is warranted, the determination of a reasonable fee will require factual information not included in the present record.

Accordingly, the order awarding fees is hereby VACATED and this appeal is REOPENED and REMANDED to the Seattle Field Office for issuance of an addendum decision on the motion for an award of attorney fees which comports with the statutory and current regulatory requirements for such an award. The motion shall not be decided before the parties are allowed to file the necessary pleadings in accordance with 5 C.F.R. 1201.37(a)(2).

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GASTON POWELL, JR.
v.
DEPARTMENT OF THE TREASURY

Docket No.
DC075299039

OPINION AND ORDER

This appeal raises the question of the propriety of an award of attorney fees by the Washington, D.C. Field Office of the Merit Systems Protection Board upon reversing the agency's refusal to permit the appellant to rescind his voluntary resignation before its effective date. The agency has petitioned for review of the award, asserting that it was erroneously made.

In her initial decision, the presiding official found that the agency's failure to allow the appellant to withdraw his resignation prior to its effective date rendered it involuntary, and that because an involuntary resignation is tantamount to an adverse action, the agency was remiss in not following proper adverse action procedures. In response to a subsequent motion for an award of attorney fees by the National Treasury Employees Union's Assistant Counsel, who represented the appellant in this appeal, the presiding official issued an order awarding $2,500.00 in attorney fees to the union.

We find that the presiding official's order awarding attorney fees is erroneous in that it lacks any analysis of the statutory and regulatory requirements for such an award, set forth and examined in detail in our recent opinions in *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980), *O'Donnell v. Department of the Interior*, 2 MSPB 604 (1980), and *Kling v. Department of Justice*, 2 MSPB 620 (1980). *See* 5 U.S.C. 7701(g)(1) and 5 C.F.R. 1201.37. The presiding official failed to make adequate findings and to provide adequate reasons for the determination of whether the interest of justice warrants an award of fees. She failed, further, to make findings adequate to support a determination of the reasonableness of the amount awarded. In the addendum decision no consideration was given, for example, to the meaning of the term "individual preparation" in the itemization of the hours spent by the appellant's attorney on this case, nor to the reasonableness of the $50.00 hourly rate claimed by the appellant's attorney, an employee of the National Treasury Employees

Union. Finally, the award of fees should be made to the attorney directly, not to the appellant or to the attorney's employer in the case of a salaried attorney, as in this appeal. *O'Donnell, supra,* at 610 n. 10.

We decline to rule on the motion for fees upon review because the parties have not yet had an opportunity to address the issue fully in light of the guidelines set forth in *Allen, O'Donnell,* and *Kling,* and because we do not have the benefit of the insights and reasoning of the presiding official who heard and observed the witnesses, especially with regard to the "interest of justice" determination. Moreover, if the presiding official adheres to her view that an award is warranted, the determination of a reasonable fee will require factual information not included in the present record.

Accordingly, the order awarding fees is hereby VACATED and this appeal is REOPENED and REMANDED to the Washington, D.C. Field Office for issuance of a reconsidered addendum decision on the motion for an award of attorney fees which comports with the statutory and regulatory requirements for such an award. The motion shall not be decided before the parties are allowed to file the necessary pleadings in accordance with 5 C.F.R. 1201.37 (a) (2).

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LYMAN N. PRICE
v.
UNITED STATES VETERANS
ADMINISTRATION

Docket No.
CH752599007

OPINION AND ORDER

Following a proposal to suspend appellant for thirteen calendar days, the agency determined, instead, to effect a five-day suspension. The decision letter informed him of his right to appeal under the V.A. grievance procedure and appellant was directed to consult with his Personnel Officer for further directions if necessary.

The initial decision of the presiding official of the Board's Chicago Field Office, citing 5 U.S.C. 7512(2), dismissed the appeal on the ground that the Board lacks jurisdiction to review appeals from suspensions of less than 15 days.

In appellant's petition for review, he alleged that the agency did not follow its policy or regulations in effecting his suspension, and that he was incorrectly advised regarding the appropriate appeal procedures. Appellant further complained that a subsequent suspension during the period September 23, 1979 through October 2, 1979 (ten days) was based on the suspension that is the subject of this appeal. He argued, therefore, that the agency was trying to circumvent the law by giving him short suspensions at different times.

Upon review of appellant's petition, the Board finds that the criteria of 5 C.F.R. 1201.115 have not been met. The presiding official correctly found that suspensions of less than 15 days are not appealable to the Board pursuant to 5 U.S.C. 7512(2). It is clear that the appellant's appeal is based solely on his five day suspension (August 13, 1979-August 17, 1979). The Board will not consider the subsequent suspension of ten days as part of this appeal; the record clearly shows that the two suspensions were based on wholly unrelated events and were unrelated in time. Thus, the Board finds no evidence that the agency tried to circumvent current regulations by imposing two suspensions of less than 15 days. Pertaining to the later suspension, appellant's recourse should have been to file a grievance at his agency, as he was advised in connection with the five day suspension.

Accordingly, appellant's petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

PRICE ROSS, JR.
v.
DEPARTMENT OF THE ARMY

Docket No.
CH531D09003

OPINION AND ORDER

Price Ross, Jr., appellant, was denied a within-grade step increase in his salary because his supervisor concluded that his work was not at an acceptable level of competence as required by 5 U.S.C. 5335. Appellant requested reconsideration of the decision, and after he received a negative decision, he appealed to the Board's Chicago Field Office. The presiding official affirmed the agency action and appellant petitioned the Board for review of the initial decision.

In the petition, appellant asserted that the agency had not adequately defined what constitutes satisfactory performance or an acceptable level of competence, that the agency failed to prove that his work did not meet satisfactory performance standards and that there is new and material evidence available which was not previously available despite due diligence by appellant. The agency contended that appellant's petition failed to meet the regulatory criteria for review.

The appellant was informed on June 7, 1979, that it was proposed to withhold a step increase in his salary. The waiting period applicable to the step increase was from June 18, 1978 to June 16, 1979. Appellant was given sixty days' advance notice as required by 5 C.F.R. 531.407 (c) (5).

The proposal letter cited seventeen reports which had not been completed in a timely manner by appellant. There was no reply to the proposal letter and it was decided on June 16, 1979 to withhold the step increase. A negative determination for the sixty day notice period was also issued due to additional deficiencies in appellant's performance during that period.

The reason for denying the step increase essentially was that appellant did not complete assigned reports in a timely fashion. This was set out in the proposal and decision letters. The appellant claimed in the petition that no standard for what constitutes an acceptable level of competence exists and therefore the denial was improper. The record shows, however, that appellant was told what elements were critical to his job, and he does not deny that he knew it was crucial for the reports to be filed in a timely manner. Therefore we conclude that the determination was based on the essential requirements of appellant's position as required by 5 C.F.R. 531.407(c)(2).

The appellant's related argument, that the agency did not prove that his work was unsatisfactory, assumes that an unsatisfactory performance appraisal is a mandatory prerequisite to a denial of a step increase. Nothing in the pertinent statute or regulations supports this assumption. *See* 5 U.S.C. 5335 and 5 C.F.R. 531.401 *et seq.* Rather, a step increase must be denied when the agency finds that the employee's performance does not meet the statutory standard for the granting of such an increase. We find no assertions or references to the record contained in the petition which show error in the presiding official's findings on this matter.

The appellant's assertion that there is new evidence available which was not previously available despite due diligence, is not supported by his submission. The alleged new evidence is a copy of an agency guide dated January 4, 1979. The appellant did not show that the document was not available to him, and therefore we conclude that it does not meet the criteria of 5 C.F.R. 1201.115(a).

Accordingly, the petition for review is denied. This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

TEODORO ACOSTA
v.
DEPARTMENT OF THE NAVY

Docket No.
NY075299029

OPINION AND ORDER

The appellee is a Machinist, WG-10, at the United States Naval Station, Roosevelt Roads, Puerto Rico, who was suspended for 30 days effective March 29, 1979, for disorderly conduct. He appealed to the Board's New York Field Office. The presiding official found that the action had commenced subsequent to January 10, 1979, and thus was governed by the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (hereafter, the Act). Applying the scope of review which the Board was given under this Act regarding suspensions of more than 14 days, the presiding official found that the charges were not supported by a preponderance of the evidence and reversed the action.

In its petition for review, the agency (hereafter petitioner) argued that the presiding official misinterpreted law and regulation, as the suspension was already pending on January 10, 1979, and thus was not governed by the Act. The appellee replied, by reasserting his arguments concerning the merits of the action, and contended that the evidence submitted by the petitioner was not "new" and that the petitioner's notice to the appellee of appeal rights to the Board constituted a voluntary acceptance of Board jurisdiction of the matter.

At the outset, the Act provides that an employee may appeal to the Board from any action which is appealable to the Board under any law, rule, or regulation. 5 U.S.C. 7701(a). The Act gives the Board authority to prescribe such regulations as may be necessary *for the performance of its functions.* 5 U.S.C. 1205(g). The Board has found, however, that this authority cannot be construed as conferring upon the Board the authority to extend appellate coverage to employees who have not been provided a right of appeal by law, or rule or regulations of the Office of Personnel Management implementing a law. *Kaapana v. Department of the Interior,* 1 MSPB 536 (1980). *Taylor v. Department of the Navy,* 2 MSPB 6 (1980). Accordingly, the Board finds that it has no authority to accept jurisdiction of matters not otherwise appealable because the parties voluntarily agree to submit the matter to the Board for review.

Prior to January 11, 1979, the effective date of the Act, there was a limited regulatory right of appeal from suspensions of 30 days or less, as set forth in 5 C.F.R. part 752C (1978). Those regulations did not provide for a review of the merits of the action. Under the Act, however, there is no such limitation on the Board's scope of review of suspensions of more than 14 days. 5 U.S.C. 7513(d). The Act provided at section 902(b), 92 Stat. 1123 (1978):

> (b) No provision of this Act shall affect any administrative proceedings pending at the time such provision takes effect. Orders shall be issued in such proceedings and appeals shall be taken therefrom as if this Act had not been enacted.

The Board's regulation implementing this provision clearly indicates than an employee situated as appellee was, had no right to appeal on the merits of such an action. 5 C.F.R. 1201.191.

In this case, an altercation occurred involving the appellee on November 9, 1978. As a result, he was given a notice on December 14, 1978, of the petitioner's proposal to suspend him for 30 days. The petitioner contended that the appellee requested an extension of time to respond to this notice. A copy of the appellee's response, dated January 10, 1979, is contained in the record. As the appellee responded by January 10, 1979, he obviously had received notice prior to that date. Although the petitioner's decision was not issued until March 26, 1979, the Board finds that the action at issue had commenced prior to January 11, 1979, the effective date of the Act and therefore was not governed thereby.

The presiding official has, therefore, misinterpreted law and regulation in finding the action governed by the Act. Accordingly, the petition for review is GRANTED on the issue of the scope of review. At the time this action commenced, review by the Board was limited to examination of the procedures used by the agency. 5 C.F.R. 752.304(b)(1978). The presiding official found the petitioner had correctly effected the suspension action in accord with 5 C.F.R. 752.302 (1978). The Board finds no error with respect to the procedural propriety of the action.

Accordingly, the decision of the presiding official is VACATED as it relates to the determination of the merits of the action, the initial decision on the procedure of the agency is AFFIRMED,[1] and the agency's action is sustained under 5 C.F.R. 752.304 (1978).

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[1] The Board makes no determination on the merits of the action. We do note that, in its petition for review, the petitioner has stated that it will advise the appellee that it considers its administrative grievance procedures now available to him concerning the merits of this action.

This is a final action of the Merit Systems Protection Board. The appellee is hereby notified of the right to file a petition for judicial review of this decision in the appropriate circuit of the United States Court of Appeals, or the United States Court of Claims within 30 days of the receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ELBERT T. DAVIS, JR.
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
SF075209045

OPINION AND ORDER

Appellant was removed from the position of Machinist with the Department of Air Force, McClellan Air Force Base, California, effective July 20, 1979, for unauthorized absences, use of abusive language and threatening bodily harm to his immediate supervisor. He appealed this action to the Board's San Francisco Field Office alleging that the action was unfair and without factual data. The presiding official found that the preponderance of evidence supported the agency's charges and affirmed the agency's action.

In his petition for review, appellant has basically attacked the credibility of the agency's evidence of the charges made against him. In essence, the appellant has stated that on one occasion of absence without leave (AWOL), he was being treated by "someone" in his dentist's office. Yet, he failed to provide written certification of this reason as required by the effective abuse of leave letter in his personnel file. Likewise, he failed to provide certification of an automobile repair on another occasion of AWOL. When the agency investigated this incident, it found that the car repair shop was not open on the day alleged by appellant. As for the charges of abusive language and threats, the presiding official accepted the supervisor's version rather than appellant's.

In arguing that the presiding official incorrectly interpreted the evidence, appellant has merely stated his disagreement with the presiding official's conclusions. He has offered no evidence tending to show that the presiding official's credibility determination was in error.

The Board in *Claude Weaver v. Department of the Navy*, 2 MSPB 297 (1980), established the parameters of review when the issue of factual determinations is raised. The Board concluded that in reviewing an initial decision, "this Board is free to substitute its own determinations of fact for those of the presiding official, giving the presiding official's finding only so much weight as may be warranted by the record and by the strength of the presiding official's reasoning." *Weaver supra*, at 298. When credibility determinations are based on demeanor evidence, the Board must depend heavily upon the presiding official's assessment of witness credibility, at least when there are no other indications of credibility included in the record. *Weaver supra*, at 298-299.

In *Weaver* the Board set out the standard that a review of the presiding official's fact finding "will ordinarily be undertaken only when the petitioning party makes a showing consistent with 5 C.F.R. 1201.115(b) (1979), which requires a demonstration that the initial decision is based on an erroneous interpretation (or application) of the statutory requirements governing the weight of the evidence." *Weaver supra*, at 299. In this case, appellant has simply reiterated his version of the facts given at the hearing. He has claimed that there is new evidence, but it is not apparent what this evidence is. He has not demonstrated why the presiding official's assessment of the credibility of the witnesses and of the facts was in error.

"When questions of credibility are presented, due deference must necessarily be given to the assessment of the presiding official who was present to hear and observe the demeanor of the witnesses." *Weaver supra*, at 299. Since appellant has referred to nothing in the record or to any other reasons to warrant reversal of the presiding official's determination, the Board finds no basis for granting the petition for review. Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days from receipt of this decision by appellant.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN J. ROBINSON v. DEPARTMENT OF HEALTH AND HUMAN SERVICES	Docket No. DA315499007

OPINION AND ORDER

Appellant's employment as a GS-5 Cook's Helper with the U.S. Public Health Service Hospital, New Orleans, Louisiana, was terminated during his probationary period for misconduct and inefficiency. On appeal, he contested that the agency's reasons for termination were founded on misunderstandings and personal differences between certain fellow employees and himself. The presiding official found that the appeal made no allegation of marital status or partisan political reasons as factors in the action, and thus, the appeal was outside the Board's jurisdiction. Therefore, he dismissed the appeal.

In his petition for review, appellant alleged that he was not a probationary employee and that he had been appointed noncompetitively by reinstatement. He claimed that he had acquired reinstatement rights through previous government service. Therefore, he contended, he is entitled to an appeal under 5 U.S.C. 7701 and to a hearing under 5 U.S.C. 7532.

Appellant has presented no evidence of previous employment other than his own statements. He has asserted that he was previously employed at Ft. Sill, Oklahoma, but he was unclear as to the type of employment and length of service. The agency's records showed that appellant was appointed competitively from a civil service register as a career-conditional employee and required to complete a one year probationary period. *See* 5 C.F.R. 315.801(a). The records also showed that he had not completed the probationary period. Therefore, without any evidence to contradict the agency's submissions, it must be assumed that appellant was a probationary employee.

Terminated probationary employees have no statutory right of appeal to the Board, 5 U.S.C. 7511(a)(1)(A). Under 5 C.F.R. 315.806(b), the Board has jurisdiction over probationer appeals of termination allegedly based upon marital status or partisan political reasons, and those claiming violation of the procedural requirements of 5 C.F.R. 315.805.

Appellant has claimed in his petition that there were partisan political reasons involved in his termination. His alleged examples of such reasons, however, have shown only personality conflicts, not partisan politics. Consequently, he has not established a basis for review.

Accordingly, the petition for review of the initial decision is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days from receipt of this decision by appellant.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL U. FUIAVA
v.
DEPARTMENT OF JUSTICE

Docket No.
SF075299009

OPINION AND ORDER

Upon removal from his position as a Correctional Officer because of alleged physical abuse of an inmate, appellant appealed to this Board's San Francisco Field Office. The presiding official found the charge sustained by a preponderance of the evidence and to be of such gravity that removal would promote the efficiency of the service.

Appellant then filed a petition for review in which he argues that the initial decision contains a misinterpretation of facts and agency rule and regulation. He also alleges the penalty is too severe because another employee involved in the incident was not so treated. In its response, the agency argues that the petition for review does not refer to evidence or argument which meets the criteria of 5 C.F.R. 1201.113.[1]

Appellant's claimed misinterpretation of facts concerns two alleged procedural errors by the agency in processing the removal action. He first contends that the presiding official erred in finding that the agency complied with the requirements of 5 U.S.C. 7513(b) and its implementing regulation, 5 C.F.R. 752.404, which provide that an employee is entitled to representation and to furnish affidavits and other documentary evidence in support of his answer to the proposed adverse action. Appellant contends that he was denied these rights because the agency did not let his union representative interview agency employees *in preparation for this Board's hearing.*

This argument is without merit. An employee's right to representation and submission of affidavits set forth at 5 U.S.C. 7513(b) and 5 C.F.R. 752.404 relates to proceedings before the agency prior to the issuance of its decision, not to proceedings before the Board. In the event an agency refuses to voluntarily make potential witnesses reasonably available prior to a Board hearing, the Board's rules provide for the issuance of orders compelling discovery by interrogatory or deposition, 5 C.F.R. 1201.73-75, and for the issuance of subpoenas, 5 C.F.R. 1201.81-85. Moreover, 5 C.F.R. 1201.32 requires Federal agencies to make employees available to furnish affidavits or to appear at a hearing upon the request of the presiding official. Because he failed to avail himself of these simple procedures to obtain information necessary to prepare his case, appellant's representative may not now claim injury by the refusal of the agency to assist voluntarily in his preparation for the hearing before this Board.

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[1] It is noted that the appellant's removal was effected February 22, 1979, and that it was, therefore, considered under the interim regulations of both the Board and the Office of Personnel Management. Therefore, all citations to Board regulations are to the interim regulations published in the Federal Register on January 19, 1979; citations to regulations issued by the Office of Personnel Management are to those published January 16, 1979.

Appellant also contends, in effect, that the agency failed to consider his replies to the proposed removal. Noting the presiding official's statement in the initial decision that appellant made no reply to the proposed removal, appellant argues that he requested his oral reply to a suspension proposed on the same charge should be considered in reply to the proposed removal. He also contends that he requested that his written submission of October 25, 1978 (concerning an identical proposal to suspend and remove which was cancelled in December 1978 by the agency because of procedural error), be considered as a current reply.

This argument also fails, for two reasons. First, appellant bears the burden of establishing as an affirmative defense that any such procedural error by the agency was likely to affect the agency's decision, but he has offered no evidence on that point. *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980). Indeed, since the suspension and the earlier proposal of removal were but the precursors of the instant removal, there is no reasonable basis to postulate any different outcome. Second, appellant's representative did not raise this argument before the presiding official, although he was on notice well before the hearing of the agency statement in its decision letter that "You did not respond to the notice orally or in writing." Absent unusual circumstances, the Board will not review allegations of agency procedural error which were not presented to the presiding official. Compare 5 C.F.R. 1201.115(a). No such unusual circumstances are present here.

Appellant also contends that presiding official erred in failing to find a violation by the agency of its own regulations concerning use of chemical dispensers to subdue the inmate during the incident that led to the charges against the appellant. He refers to Federal Prison System Policy Statement Number 20001.8A, dated September 6, 1978, which states:

> USE OF CHEMICAL AGENTS. If the situation is such that the inmate is armed and barricaded or cannot be approached

> without danger to personnel or to self, and when it is determined that a delay in bringing the situation under control would constitute a serious hazard to the inmate, other people, or result in a major disturbance, or major property damage, the use of chemical dispensers is authorized.

Appellant contends that circumstances such as the policy statement refers to were present here and that the supervisory personnel involved should have issued instructions for the use of chemical dispensers to control the inmate. This contention also was not raised before the presiding official, and good cause has not been shown for its belated presentation on review. Moreover, it is plain on the face of the policy statement that while it authorizes the use of chemical dispensers in certain circumstances, it does not mandate their use. Whether or not the agency's decision not to use chemical dispensers was correct, that decision does not shield appellant from the consequences of his conduct. Appellant admitted that he "stomped" the inmate on the head during the attempts to subdue him, and we find that this conduct was inexcusable under the circumstances involved.

Finally, appellant argues that he was treated more severely than another employee who also allegedly abused the same inmate in this incident. However, as appellant himself admits, the agency also suspended the other employee for thirty days and removed him. The allegation of disparate treatment arises from the fact that the other employee prevailed in his appeal before the Board's Field Office. This obviously is not a situation of unlike penalties for like offenses, for the same penalties were imposed on both employees by the agency. The presiding official's finding that the penalty of removal was not too severe and was for such cause as would promote the efficiency of the service is justified under the circumstances of this case. Moreover, the facts involved in the other case were not at all the same as those in this, even though they had their genesis in the same incident. The reversal of the agency decision to remove the other employee does not therefore imply that a similar decision should have resulted here.

Accordingly, the petition for review is denied. This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby informed of his right to petition for judicial review in the U.S. Court of Appeals for the appropriate circuit or in the U.S. Court of Claims, within thirty days of his receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Larry C. Taggart v. **United States Postal Service**	Docket No. PH075299041

Opinion and Order

The petition dated August 20, 1979, seeks review of the initial decision of the presiding official which sustained petitioner's removal from his position with the United States Postal Service.

I. FACTUAL BACKGROUND

Petitioner was removed from his position as part-time flexible Distribution Clerk with the United States Post Office at Philadelphia, Pennsylvania, effective April 30, 1979.

On appeal to the Philadelphia Field Office of the Board, petitioner alleged, *inter alia:* (1) that the Postal Service (hereinafter referred to as "the agency") engaged in disparity of treatment in its removal of petitioner and another employee, one Roy B. Ditto; and (2) that the agency improperly failed to consider petitioner's second written response, dated March 27, 1979, to the advance notice of separation.

In the initial decision dated July 25, 1979, the presiding official, among other findings of fact not here pertinent, determined that: (1) disparity of treatment was not engaged in by the agency since the instant case was distinguishable from the Ditto case; (2) the agency's failure to consider petitioner's March 27, 1979 response was appropriate in light of the finding that petitioner failed to prove timeliness in submitting the response; and (3) the agency's decision to remove was supported by a preponderance of the evidence.

On review, petitioner submitted a combined list of numerous documents and other items, some of which he characterized as new and material evidence. The materials upon which petitioner relied as constituting new and material evidence consisted, as far as we are able to determine, of the Board's August 6, 1979 Order reopening the Ditto case, the initial decision of the presiding official, and, what he termed his "written rebuttal summation" of the June 14, 1979 hearing.

Petitioner claimed, as the bases for review, new and material evidence which he alleged was "not readily available when the records were closed" and erroneous interpretation of statute or regulation by the presiding official.

II. ISSUES

The issues presented on review are: (1) whether the documents and information relied on by petitioner satisfy the requirements for review under 5 C.F.R. 1201.115(a); and (2) whether the presiding official erroneously interpreted any applicable statute or regulation (5 C.F.R. 1201.115(b)).

III. DISCUSSION

In regard to the Board's Order of August 6, 1979, reopening the Ditto case, petitioner has failed to state his basis for relying on that Order. Hence, the existence of the Order, standing alone, is insufficient to meet the requirements of "new and material evidence" under 5 C.F.R. 1201.115(a).

Petitioner's assertion that his written summation and the initial decision constituted new and material evidence is obviously frivolous. The summation of a case does not constitute evidence, *United States v. Hawkins*, 595 F. 2d (D.C. Cir. 1978), and neither does the decision of the presiding official, *United States Retail Credit Association, Inc. v. F.T.C.*, 300 F. 2d 212 (4th Cir. 1962). Consequently, these documents do not qualify as new evidence under 5 C.F.R. 1201.115(a).

With respect to the allegation of erroneous interpretation by the presiding official of statute or regulation, petitioner did not state the specific statute or regulation which he asserted was so misinterpreted. However, he contended: (1) that the presiding official failed to consider both evidence of disparity of treatment between petitioner and Ditto and evidence of timeliness of the submission of the March 27, 1979 response to the advance notice of separation; and (2) that the burden of proof of the foregoing matters rested with the agency, which failed to sustain the burden.

As provided by 5 U.S.C. 7701(c)(1)(B), the agency's case must be supported by a preponderance of the evidence. However, petitioner did not claim that the agency failed to prove its case for his removal by a preponderance of the evidence. Rather, he contended that the agency was obligated to prove absence of disparity of treatment and untimeliness of the March 27, 1979 response.

In support of his disparity of treatment defense, petitioner alleged that: (1) Ditto was suspended three times, while petitioner was suspended only twice, prior to being issued a final decision of removal; (2) Ditto's advance notice of removal was dated February 23, 1979, and petitioner's was March 12, 1979; (3) both Ditto and petitioner were assigned to the same work section and tour of duty; (4) both were charged with failure to report for duty as scheduled; (5) both were issued two letters of warning; (6) both notices of removal were signed by the same official; and (7) Ditto was tardy on seven occasions while petitioner was tardy on five occasions.

The agency defended the difference in its treatment of both employees by stating that Ditto's unauthorized absences were due to recurrent illness and that such absences appeared seven years subsequent to Ditto's appointment with the agency, whereas petitioner's attendance problems [1] manifested themselves during his first year of employment.

Petitioner produced no further evidence of discriminatory treatment. Neither did he offer any rebuttal to the agency's response, which we conclude sets forth valid considerations for the determination of penalties. Reviewing the record as a whole, we find the two cases clearly distinguishable and, therefore, that the record does not support a finding of disparate treatment. *See*, generally, *Henry v. Ford Motor Co.*, 553 F. 2d 46 (8th Cir. 1977).

Petitioner's allegation that the presiding official failed to consider evidence of the timeliness of his March 27, 1979 response is without merit.

Pursuant to 5 U.S.C. 7513(b)(2), petitioner was entitled to not less than seven days within which to respond to charges in the advance notice of separation. He was expressly notified by the agency that he was being allowed ten calendar days from the date of receipt of the notice to so respond. Although the record does not appear to indicate the date on which petitioner received the advance notice, which was dated March 12, 1979, petitioner's first response, dated March 22, 1979 was deemed timely submitted and, consequently, was considered by the agency in arriving at its final decision to separate.

The agency contended that it failed to consider the March 27, 1979 response submitted by petitioner inasmuch as that response was received subsequent to its issuance of the decision to remove. In support of the timeliness of his March 27, 1979 response, petitioner simply argued that, because the agency imprinted identical notations on both the March 22, 1979 and March 27, 1979 responses, and because the March 22 response was timely received and was considered by the agency, then the March 27 response must also have been timely received. On each response was stamped the following notation:

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[1] Petitioner admitted in several letters to the agency that his attendance problems were caused by transportation difficulties and by the incompatibility of his pursuit of higher education with his employment. Those reasons, offered as mitigating circumstances on appeal, were rejected by the presiding official.

PHILADELPHIA, PA.
May 17, 1979
PERSONNEL SECTION

Also appearing on the responses were the handwritten initials "NP" and "JDB" and the date, May 17, 1979. However, since the undated final decision was received by petitioner on April 27, 1979, and the notations indicated the date, May 17, 1979, it is clear that the notations have no bearing on the issue of timeliness of the March 27, 1979 response. Hence, petitioner failed to introduce any credible evidence in support of his allegation that the agency had received the response prior to issuance of its decision. *See* 5 U.S.C. 7701(c)(2)(a) and 5 C.F.R. 1201.56(b)(1), which provide that the appellant bears the burden of proving harmful procedural error by the agency. In this regard, *See* also *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980).

IV. CONCLUSION

We therefore find that the materials and documents relied on by petitioner do not meet the criteria for review under 5 C.F.R. 1201.115(a). We further find no erroneous interpretation by the presiding official of applicable statute or regulation as required by 5 C.F.R. 1201.115(b).

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Petitioner is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision by petitioner.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 18, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MABEL M. CHARLES v. DEPARTMENT OF THE NAVY	Docket No. SF075299073

OPINION AND ORDER

Petitioner appealed from a decision of the Department of the Navy, Long Beach Naval Shipyard, Long Beach, California, which reassigned her from the position of Supervisory Supply Technician, GS-2005-9/5, to Supply Systems Analyst, GS-2005-9/5, a position of the same grade and salary.

In the initial decision, the presiding official held that the reassignment was not among the appealable actions set forth in 5 U.S.C. 7512, and thereupon dismissed the appeal.

Petitioner alleged, in her request for review by the Board, that failure by the Department of the Navy to submit to her, as instructed by the presiding official, a copy of its reply to the presiding official constituted discrimination and reprisal due to past complaints.

Further, petitioner alleged that discrimination and reprisal due to past complaints were the bases for her reassignment.

Pursuant to the Civil Service Reform Act of 1978, Public Law 95-454, 92 Stat. 1111 *et seq.* (October 13, 1978), the Board has the authority to decide all matters within its jurisdiction under any law, rule or regulation. 5 U.S.C. 1205(a)(1); 5 C.F.R. 1201.3. Under 5 U.S.C. 7512, a reassignment not involving a reduction in grade or pay is not an appealable action. Nor is there any regulation making such reassignment appealable. Hence, the Board has no authority to consider such an appeal.

Petitioner further alleged that she has additional evidence that could be submitted, but does not allege that the additional evidence bears on the jurisdictional issue.

With regard to petitioner's allegation of discrimination and "prohibited personnel actions," neither an allegation of discriminaton nor a prohibited personnel practice alone can invoke the Board's appellate jurisdiction. Under 5 U.S.C. 7701(c)(2), such an allegation merely raises an affirmative defense in an action which is otherwise appealable to the Board. See also 5 C.F.R. 1201.3(a)(5), which clearly states that the Board's appellate jurisdiction includes "[a]ctions *otherwise appealable to the Board* involving an allegation of discrimination." (emphasis supplied).

Moreover, a charge of prohibited discrimination cannot per se make an action appealable to the Board. Jurisdiction over complaints concerning discrimination in actions not appealable to the Board was transferred to the Equal Employment Opportunity Commission under Reorganization Plan No. 1 of 1978, as published in 43 Fed. Reg. 19807 (1978).

Thus, the Board finds that petitioner's allegations are not within the Board's appellate jurisdiction and that the petition for review does not meet the regulatory criteria for review by the Board. See 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Petitioner is hereby advised of her right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 19, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD A. FROST v. DEPARTMENT OF THE NAVY	Docket No. BN075299015

OPINION AND ORDER

This case concerns the propriety of an award of attorney fees to appellant by the Boston Field Office of the Merit Systems Protection Board upon the reversal of appellant's removal from the service for an alleged physical disability. In response to appellant's motion for fees, the presiding official made the award in an undated order, stating in its entirety:

> Appellant's motion for attorney's fees and expenses in the amount of $1,076.25, filed September 6, 1979, without objection by respondent having been received within ten (10) days, it is hereby ordered that the motion and supporting account be allowed and payment made by the respondent as provided by 5 USCA 7701(g) and 5 CFR 1201.37(a)(2).

Both the agency and the Office of Personnel Management (OPM) have petitioned for review of this award, asserting that it was erroneously made.

Clearly the presiding official's order awarding attorney fees is erroneous in that it lacks any analysis of the statutory and regulatory requirements for such an award, set forth and examined in detail in our recent opinions in *Allen v. U.S. Postal Service*, 2 MSPB 582 (1980), *O'Donnell v. Department of the Interior*, 2 MSPB 604 (1980), and *Kling v. Department of Justice*, 2 MSPB 620 (1980). *See* 5 U.S.C. 7701(g)(1) and 5 C.F.R. 1201.37(a). We find it unnecessary, at this time, to reach the subsidiary issues raised by the agency and OPM in their petitions because those issues have been resolved in *Allen, O'Donnell*, and *Kling*. Particularly, as emphasized in *Allen*, attorney fees may be awarded only when all of the requirements for such an award have been met, whether or not the motion for fees is actively opposed by the agency.

We decline to rule on the motion for fees upon review because the parties have not yet had an opportunity to address the issue fully in light of the guidelines set forth in *Allen, O'Donnell*, and *Kling*, and because we do not have the benefit of the insights and reasoning of the presiding official who heard and observed the witnesses, especially with regard to the "interest of justice" determination. Moreover, if the presiding official adheres to his view that an award is warranted, determination of a reasonable fee will require factual information not included in the present record.

Accordingly, the order awarding fees is hereby VACATED, and this appeal is REOPENED and REMANDED to the Boston Field Office for issuance of a reconsidered addendum decision on the motion for an award of attorney fees which comports with the statutory and regulatory requirements for such an award. The motion shall not be decided before the parties are allowed to file the necessary pleadings in accordance with 5 C.F.R. 1201.37 (a)(2).

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 22, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JAMES H. JENKINS
v.
GENERAL SERVICES ADMINISTRATION

Docket No.
SF075209031

OPINION AND ORDER

Appellant was removed from his position as Security Monitor-Dispatcher, General Services Administration, San Francisco, California, based on the following: (1) failure to accept a new assignment, and (2) unauthorized absence. Appellant received an appointment effective March 12, 1978, as a Career Intern for building manager but was subsequently taken out of the training program and reassigned to the position of Security Monitor-Dispatcher, at the same grade and pay, effective March 19, 1979. Appellant failed to report as directed and was absent without proper authorization, thus leading to his removal.

Appellant appealed to the Board's San Francisco Field Office, which held a hearing. By initial decision the presiding official found that the procedural requirements of 5 U.S.C. 7513 were complied with, and that the charges were supported by the preponderance of the evidence. The decision also found that a *prima facie* showing of racial discrimination had not been made and that appellant's removal was not an act of reprisal. Therefore, the agency's removal action was affirmed.

The petition for review argued that the presiding official erroneously interpreted various sections of the Civil Service Reform Act of 1978, and that statutes were violated by the agency in firing him without legal authority.

Appellant has alleged that the presiding official erroneously interpreted 5 C.F.R. Part 432, and 5 C.F.R. 430.101, 752.404, 1201.56, as well as 5 U.S.C. 7512.

Appellant's reliance upon 5 C.F.R. 430 and 432 is misplaced. Those regulations relate to a removal under 5 U.S.C. 4303 based on "unacceptable performance" by the individual employee. However, the record clearly reflects that appellant was not removed for alleged unacceptable performance but because of his refusal to accept the new assignment to security monitor-dispatcher and his absence therefrom. His removal, therefore, is not governed by 5

U.S.C. 4303 but rather by Chapter 75 of title 5, United States Code, based on the "efficiency of the service," and the procedural requirements of title 5 C.F.R. Part 752. 5 U.S.C. Chapter 43 is not relevant to the instant action.

In his appeal to the field office, appellant alleged that the agency's oral reply officer, who heard his reply of May 1, 1979, was not the official who made the final decision. In his petition, appellant asserted that the oral reply officer did not recommend a final decision, as required by 5 C.F.R. 752.404(c). In this connection, the presiding official noted that appellant's oral reply made to and summarized by the Executive Officer was fully considered by the deciding official (Acting Regional Commissioner) in reaching the decision to remove appellant. The evidence before the Board, however, contains no documentation that a written or oral recommendation was made by the Executive Officer to the deciding official. Accordingly, the question is whether there was procedural error by the failure of the reply officer to make a recommendation, and, if so, whether the error was harmful.

5 C.F.R. 1201.56(c)(3) defines harmful error as follows:

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

We have recently considered the matter of harmful error in *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). In that decision, we found that:

> Unless it is likely that an alleged error affected the result, its occurrence cannot have been prejudicial. *Doe v. Hampton*, 566 F. 2d 265, 278 (D.C. Cir. 1977); *Pascal v. United States*, 543 F. 2d 1284, 1288 (Ct. Cl. 1976); *see Chrysler Corp. v. FTC*, 561 F. 2d 357, 362-363 (D.C. Cir. 1977). Stated another way, the question is whether it was within the range of appreciable probability that the error had a harmful effect upon the outcome before the agency. However stated, the decisive factors are the closeness of the agency's decision, the centrality of the issue affected by the error, and any steps taken to mitigate the effect of the error. See *Gaither v. United States*, 413 F. 2d 1061 (D.C. Cir. 1969).

Applying these standards to the instant case, we find that appellant has not met the burden of showing, as an affirmative defense, that any error in this respect was harmful.

Under the circumstances of this case, we find no harmful procedural error in the fact that the oral reply officer did not make a recommendation to the deciding official. We note that the appellant failed to call the oral reply officer to testify (Hearing Transcript, pgs 18-28, 554) or to show that if he had made a recommendation it would have been favorable. Appellant has failed to establish that there was an appreciable probability that such a recommendation would have changed the outcome of the agency's decision. Accordingly, we find that the record fails to demonstrate harmful procedural error in connection with the oral reply officer.

With respect to the reassignment, it is well established that an agency has both the right and responsibility to reassign personnel for the good of the service. *See* 5 C.F.R. 335.102. In *Ketterer v. U.S. Department of Agriculture*, 2 MSPB 459, 461 (1980) the Board stated:

> In a removal for cause following a refusal to accept a reassignment, the agency must prove by a preponderance of the evidence that the removal will promote the efficiency of the service. This necessarily includes a demonstration that the agency's decision to reassign the employee was a bona fide determination based on legitimate management considerations in the interest of the service. (Citation omitted)

Upon all the facts and circumstances presented, the Board finds that the decision to reassign appellant was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service, and it will not review those management considerations further. *Ketterer, supra,* at 462 n. 8. After the agency made the determination to administratively reassign appellant to another position at the same grade and pay, within the same commuting area, and he refused or failed to report as directed, the agency had appropriate grounds to remove him.

Appellant was charged with failure to accept a new assignment and unauthorized absence. We agree with the presiding official that the reasons are fully supported by the preponderance of the evidence. Appellant's contention that he was removed for filing grievances is not supported by the record, particularly since the grievances pertained to his tenure in the training program.

Appellant had been informed where and when he was to report to his new assignment. He was further informed that he was being carried in an AWOL status and that continued failure to report for duty would result in the initiation of disciplinary action. Appellant persisted in absenting himself from duty after repeated orders to report and warnings concerning his status.

The preponderance of the evidence standard, 5 U.S.C. 7701 (c) (1) (B) and 5 C.F.R. 1201.56 (a) (ii), was correctly interpreted and appropriately applied by the presiding official under the facts of this case. The Board finds no indication that the initial decision was based on an erroneous interpretation of statute or regulation, and appellant has raised no matters warranting review by the Board. *See* 5 C.F.R. 1201.115. Accordingly, the petition for review is DENIED.

This is a final decision of the Board.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 22, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICARDO M. LUNA	
v.	Docket No.
U.S. POSTAL SERVICE	SF075299046

OPINION AND ORDER

Appellant was removed from a position of Distribution Clerk, Machine, U.S. Postal Service, Oakland, California, effective May 7, 1979. His appeal to the Board's San Francisco Field Office was postmarked June 9, 1979, and was received in the Field Office on June 11, 1979, twelve (12) days after the deadline for filing. In his appeal, appellant acknowledged his failure to file timely and stated that it was "due to circumstances beyond my control." In response to the Field Office invitation to explain how he was prevented from filing a timely appeal, appellant responded on June 20, 1979 that the time limit for filing had expired by the time his initial feelings of frustration and bitterness over his removal had passed. Given an opportunity for further response to explain the delay in filing, appellant contended that an exception should be made to the appeal deadline because of the very emotional and sensitive nature of the reasons for the removal. The presiding official issued his decision on July 26, 1979, and found that good cause which would warrant waiving the time limit had not been established, and dismissed appellant's appeal as untimely. The petition for review argued that the presiding official misinterpreted the regulations in not finding good cause for waiving the time limit, and that he failed to consider the reasons and extenuating circumstances that surrounded the failure to file the appeal within the time limitation. It stated that the appellant was removed from employment because of an alleged schizophrenic disorder and was in a state of shock and stress because of his removal. The petition stated that as a direct result of this emotional disability, appellant was unable to logically comprehend the ramifications of not filing an appeal within twenty days. The agency responded that the presiding official had considered the alleged extenuating circumstances, and had made a correct judgment.

At the time of appellant's removal, the Board's interim regulations, published in the Federal Register on January 19, 1979, were in effect. These regulations provided in section 1201.11(b):

> (b) Time of filing: The petition shall be filed in designated place no later than twenty calendar days after the effective date of the agency action complained of, or the appellant's receipt of notice of the appealable action, whichever is later.

At the time of the initial decision, the Board's regulations relating to organization and procedures, published in the Federal Register on June 29, 1979, were in effect. These regulations provide in 1201.12:

> The Board may revoke, amend or waive any of these regulations as they apply generally to all cases in accordance with the applicable procedures of the Administrative Procedure Act. A presiding official may waive a Board regulation in an individual case for good cause shown if application of the regulation is not required by statute.

Upon review of the record, the Board notes that the appellant was suffering from a mental disorder as determined by the agency's designated physician. In light of the evidence of appellant's emotional state, the Board finds that there was sufficient cause to waive the time limit and consider the appeal. On remand, the presiding official should examine the Rehabilitation Act of 1973 (29 U.S.C. 791), implementing regulations of the Equal Employment Opportunity Commission (29 C.F.R. 1613 702), and 5 U.S.C. 2302(b)(1).

Accordingly, the petition for review is GRANTED. The initial decision, SF075299046, dated July 26, 1979, dismissing the appeal for want of timeliness is REVERSED, and the case is REMANDED to the presiding official for adjudication of the appeal.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 22, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES MADRID v. DEPARTMENT OF JUSTICE	Docket No. DA075209127

OPINION AND ORDER

Appellant was removed on a charge of abuse of sick leave from a position as Dairy Farmer Foreman at the LaTuna Federal Correctional Institution effective June 30, 1979. On July 2, 1979, he appealed the removal action to the Dallas Field Office, and a hearing was scheduled for September 18, 1979. By letter dated September 4, 1979, from the South Central Regional Office of the Federal Prison System, the Dallas Field Office was advised that the appellant had filed a formal EEO complaint with the Federal Bureau of Prisons relative to the removal action. The date of appellant's filing of the EEO complaint was not specified in the letter.

By letter dated September 10, 1979, the presiding official, citing 5 C.F.R. 1201.154 notified appellant that his appeal had been dismissed without prejudice to allow for an agency decision on the EEO complaint. The presiding official's letter to appellant did not characterize the dismissal action as an initial decision of the Board and did not include notice of further appeal rights to the Board. However, the presiding official informed appellant that if he was not satisfied with the agency's decision on the discrimination complaint, or if the agency did not act within 120 days, that the appellant could refile his appeal with the Board.

On September 24, 1979, the appellant filed a petition for review of the dismissal order. The petition for review alleged an erroneous interpretation of law and regulation in the decision to dismiss the appeal without prejudice. The relief requested in the petition for review is that the appellant's case be reinstated.

The respondent did not reply to the petition for review.

The Board had proper appellate jurisdiction in this case commencing with the filing of the petition for appeal of the removal action. See 5 C.F.R. 1201.3(1). Although the specific date of the filing of the discrimination complaint with the agency is not stated in the record, the petition for review makes clear it was filed subsequent to the filing of the petition for appeal.

The Board recently decided the issue presented in appellant's case in *Cardenas v. U.S. Postal Service,* 1 MSPB 560 (1980). In *Cardenas*, the appellant had filed a discrimination complaint with the agency subsequent to filing an appeal of an adverse action with the Board. In remanding and reversing the initial decision, the Board held that "in a case where the petitioner was aware of the discrimination, yet initially chose to bring his action before the Board, the Board need not delay its jurisdiction unless the parties agree, and the presiding official finds to do so would be in the interests of justice."

Thus, the Board finds that the presiding official erroneously interpreted 5 C.F.R. 1201.154 in making a determination that the appeal could not yet be accepted by the Board. The Board further finds, however, that despite the error by the presiding official, the issue raised in the petition for review has been rendered moot because the petition for appeal was refiled with the field office on December 12, 1979. That appeal was accepted for processing by the field office.

Therefore, because the issue raised in the petition for review is now moot, the petition is DENIED. This is a final decision of the Merit Systems Protection Board on this case. The appellant is hereby informed of his right to request judicial review in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 22, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHERYL A. BONSU
v.
VETERANS ADMINISTRATION

Docket No.
NY075299026

OPINION AND ORDER

Appellant was removed from her position as Psychiatric Nursing Assistant, GS-3, based on charges of disrespectful conduct and threatening a nurse. One past disciplinary action against appellant was also referenced in the letter of charges and decision.

On appeal to the New York Field Office, the presiding official noted that there was no direct corroboration available because appellant and her accuser were alone at the time of the alleged incident. Stating specifically that the credibility of the appellant and her accuser, Ms. Morella, was at issue, the presiding official determined that the latter was more credible because the testimony of a third person supported Ms. Morella's statement that appellant had followed her into the closet at the time in question. The third person was a visitor to the hospital, a Mrs. Straka, who stated that she saw both appellant and Ms. Morella entering and leaving the closet at about the time of the alleged incident. The presiding official also considered appellant's contention that the charge against her was based on Ms. Morella's resentment due to an earlier incident and determined that, in fact, it provided a greater motivation for appellant to have threatened Ms. Morella than for Ms. Morella to fabricate the present incident. He then concluded that the preponderance of the evidence supported the charges against appellant and that the removal action was taken for such cause as will promote the efficiency of the service.

The appellant filed a petition for review of the initial decision, in which she asserted that the removal was not supported by a preponderance of the evidence, and that the agency improperly denied her representation. The Board's definition of the term "preponderance" is set forth at 5 C.F.R. 1201.56(c)(2), and requires that the evidence presented be sufficient to a reasonable mind to support a conclusion that the matter asserted is more likely to be true than not. Appellant has not alleged or shown that the presiding official applied a different standard or misinterpreted the meaning of this standard. Rather, appellant has taken issue with the findings of fact and credibility determinations on which the presiding official specifically based his decision.

In the petition appellant attempted to impeach the credibility of the witness, by questioning her testimony and alleging she was coached. This does not provide a basis for granting the petition for review. The arguments are not supported by new or material evidence; they should properly have been made, and to some extent were, in the closing remarks at the hearing. The presiding official found them unpersuasive, and absent new evidence, such finding should not be disturbed unless the evidence was insufficient to support the charges by a preponderance of the evidence.

Mrs. Straka's testimony was crucial evidence in the case. Without it, there would have been no corroboration of the charges. The witness was a disinterested third party, not employed by the agency, and she directly refuted appellant's testimony that she did not go into the closet at or near the time of the alleged incident, while confirming Ms. Morella's testimony. This testimony, along with the other evidence presented, supported the charges to a degree which a reasonable mind might accept as sufficient. Thus, the applicable standard of proof was correctly applied. We conclude that the petition fails to make a sufficient showing of "a serious evidentiary question justifying a complete review of the record," *Weaver v. Department of the Navy*, 2 MSPB 297, 299 (1980) and that due deference must be given to the presiding official's credibility assessment which appears well supported by the evidence.

Appellant also argued that she was denied representation by Mr. George Sekol, Nursing Service Chief. This issue was not raised at the initial hearing by appellant's representative. Appellant's argument is not accompanied by new and material evidence which would explain why the issue was not raised at the hearing. Therefore, this newly raised argument does not meet the criteria for review.

Accordingly the petition for review fails to meet the criteria for review, 5 C.F.R. 1201.115, and it is DENIED. This is a final decision of the Merit Systems Protection Board. A petition for judicial review may be filed in the appropriate circuit of the United States Court of Appeals or United States Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 23, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DANIEL P. CROKEN
v.
U.S. POSTAL SERVICE

Docket No.
BN075299031

OPINION AND ORDER

I. INTRODUCTION

Daniel P. Croken, appellant, was discharged by the respondent U.S. Postal Service (hereinafter the agency) on June 15, 1979. Appellant's attorney filed an appeal on appellant's behalf with the Board's Boston Field Office. After a hearing was conducted, the presiding official sustained the removal of appellant, and a petition for review was filed with the Board by appellant's attorney.

The appellant, who was employed as Manager, Customer Services, was charged by the agency with falsifying the amount of merchandise (stamps) destroyed at the local Post Office in an effort to hide shortages which occurred in various clerks' accounts. In support of its charge, the agency relied upon the sworn statements of four different clerks that they inflated stamp destruction figures to cover shortages and that appellant was aware of this procedure, as it was either done on his or the Postmaster's instructions, and it was the appellant who signed the certificates verifying the amount claimed to have been destroyed. Additionally, it was further alleged that appellant did not follow certain required procedures in relation to destruction of stamps and reporting of shortages.

In presenting its case, the agency relied heavily on documentary evidence, calling only two witnesses to testify. The appellant's evidence was limited to his testimony. The presiding official found that the agency had shown that appellant had committed some procedural irregularities by failure to report certain small shortages, but that these irregularities were the result of established practice and conformed to the directions of the Postmaster. However, he also found that the agency had shown by the preponderance of the evidence that appellant had knowingly falsified destruction certificates in order to balance shortages, and that he did this by having others sign the destruction certificates without verifying the amount of merchandise destroyed. Accordingly, the presiding official upheld the decision of the agency to remove appellant and found that such removal was for the efficiency of the service.

In his petition for review, appellant asserts principally that he was not afforded an opportunity to cross-examine the witnesses against him in violation of the Fifth Amendment of the Constitution of the United States. In a related argument, appellant contends that the findings of the presiding official were not supported by the weight of the evidence, in large part because the agency's evidence was not subject to cross-examination. Appellant also asserts that because his offense was similar to that committed by the other members of the Stamp Destruction Committee, who received two-week suspensions, the penalty of removal was inappropriately leveled against him.

II. THE DUE PROCESS ARGUMENT

Counsel for appellant argues that "the denial of Mr. Croken's right to cross-examine his primary accusers at his termination hearing constituted a violation of his rights to due process under the Fifth Amendment of the United States Constitution . . ." Petition for Review at 12-13.

In support of this argument, appellant cites a number of cases which establish the right to an "opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254,270 (1970); *Green v. McElroy*, 360 U.S. 474,496 (1959). Since we agree that appellant has the right to an opportunity to confront and cross-examine adverse witnesses, we need not address the cited cases in detail. Rather, appellant's argument is unpersuasive because it is clear that he had the opportunity to assert his right, but failed to avail himself of it.

As early as May 24 ,1979, when he received notice of proposed removal, appellant was apprised that the agency was relying on written statements of several postal clerks in support of its charges, and that those statements were available to appellant for inspection. In a written reply to the proposal letter, appellant's attorney evidenced knowledge of the existence of the statements. Further, copies of the statements were sent to the attorney on June 29, 1979, and the agency's list of witnesses was sent on July 23, 1979. It is apparent that appellant and his attorney were on notice, for more than two months, from the personal letter of May 24, 1979, to the day of the hearing, August 2, 1979, that the agency was relying on written statements to prove its case. These statements have been available to appellant throughout the proceedings.

Appellant, who was represented by counsel, could have sought Board assistance in securing information from or the appearance of agency witnesses or other persons who might have provided evidence relevant to his appeal. A wide variety of investigatory devices—interrogatories, depositions, and subpoenas for documents or testimony—was available to appellant,[1] but none was sought.

Further, the agency relied on the statement of Postal Clerk John Morini, among others, to support its charges against appellant. Morini had been listed by the agency as an intended witness. On the day of the hearing, Morini was testifying before the grand jury and the agency representative said that he would not call Morini to testify. The presiding official offered to have Morini appear the next day so that he could be questioned by appellant's attorney, but the attorney said he did not wish to question Morini. Hearing transcript at 68-69. Clearly, there was an opportunity to question Morini, and just as clearly, appellant's attorney elected to forego that opportunity.[2]

Appellant clearly had ample opportunity to call or question whatever witnesses he thought necessary, but decided for unstated reasons, not to do so. Accordingly, his allegation of denial of due process is unfounded.[3]

III. THE WEIGHT OF THE EVIDENCE

Appellant also argues that the agency did not prove its charges by a preponderance of the evidence. Specifically, appellant asserts that the finding by the presiding official that the sworn statement of Morini was "more worthy of belief than the testimony of the appellant," was contrary to the evidence. Initial Decision at 6. Additionally, appellant submitted "new" evidence which he argues undercuts the credibility of Morini's statement. Appellant's allegations with regard to the evidence are sufficient to merit our examination of the record. *Weaver v. Department of Navy*, 2 MSPB 297 (1980).

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[1] See 5 U.S.C. § 1205(b) (2), and the procedural regulations of the Board at 5 CFR § 1201.71 ff. (June 29, 1979).

[2] Appellant's assertion that Morini would have refused to testify on grounds of self-incrimination lacks support since the attorney for appellant waived Morini's appearance. At this point, we can only speculate whether Morini would have refused to testify. If Morini had refused to testify, our view of his written statement would have been affected, but since this did not occur, the argument does not merit further consideration.

[3] Appellant's allegations that the statements upon which the agency relied were obtained under duress must also fail. Each statement recites on its face that it was freely given. An allegation to the contrary cannot stand in the face of appellant's failure to seek support for his allegation through questioning of those who executed the statements.

Further, appellant cannot allege or imply on petition for review that "duress" was unknown at the time of hearing, since counsel for appellant alleged at hearing that the statements of Morini and one other employee were taken under duress. Transcript of Hearings at 41-42.

We affirm the finding of the presiding official that the agency's charge is supported by the preponderance of the evidence, but we reopen to modify his findings. We find broader support in the record for his conclusion than resides merely in the statement of Morini.

The difficulty with appellant's position is not that Morini's statement is, in itself, more credible than the testimony of appellant, but that the record as a whole establishes that appellant, as well as most of the employees at that Post Office, systematically covered up shortages which occurred by inflating in official records the amount of stock which was supposed to have been destroyed. In addition to Morini, five other clerks admitted to this practice. Two of the clerks stated it was done at appellant's instructions, and that appellant, as Chairman of the Stamp Destruction Committee, signed the certificates.

Furthermore, a supervisor admitted that he was aware of the practice and that the Postmaster instructed appellant to take care of the shortages. Additionally, members of the Stamp Destruction Committee stated that appellant had them sign destruction certificates for merchandise which they had not verified as to amount, or, in some instances, when they had not witnessed the actual destruction of the stamps.

In the initial decision, the presiding official detailed much of the evidence contained in the record. In assessing the credibility of Morini's statement, the presiding official noted that the alterations in the records consistently brought them within the tolerances allowed for shortages, and that the incorrect amounts on the stock certificates were of such magnitude that the errors were readily apparent. Also significant in our view is the fact that the appellant's responsibilities entailed supervising the clerks and serving as Chairman of the Stamp Destruction Committee. These positions were crucial to management control of merchandise and cash.

Equally important to the case, though not discussed in detail in the initial decision, were the other statements of record offered by the agency.[4] These statements detail how destruction was

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[4] The details of the most pertinent statements may be summarized as follows:

Statement of Michael Czech, Clerk—This employee had been employed at that office for six years. He said that on several occasions he had been "short," but only once did he pay the money back without being reimbursed. On August 16, 1978, he was short approximately $200.00. He covered the amount, and then on September 22, 1978, was reimbursed by use of a destruction certificate. He said appellant was aware of the accomplished. They tend to show that appellant, as Chairman of the Stamp Destruction Committee, controlled the approval of destruction certificates. Two clerks detailed how their shortages were handled, and one recounted his observation of appellant adjusting a count sheet for shortages covered by destruction certificates.

Appellant admitted that there were some shortages, as reported in the statements on which the agency relied. He denied using false destruction certificates to cover the missing merchandise or cash. He contended that the inflated certificates signed by him were signed without knowledge that they were false. In view of the entire record, we find that the statements and supporting documents offered by the agency are more credible than the testimony of appellant, and conclude accordingly that the agency proved by preponderance of the evidence that appellant knowingly participated in the falsification of destruction certificates as charged.[5]

IV. THE PENALTY IMPOSED ON APPELLANT

Appellant's final argument is that he was subjected to a greater penalty than the other two members of the Stamp Destruction Committee although, it is alleged, they were charged with similar

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shortage and signed the certificate. Supporting records are attached to his statement.

Statement of Richard J. Brady, Clerk—This employee had been with the Post Office four years. He admitted to falsifying, on his account sheet, the amount of voided postage in his till. The amount was $61.50. He said this was done on appellant's instructions. Supporting records are included in the record of the instant case.

Statement of Edward E. Dion, Clerk—Post Office employee 13 years. He recited the general practices concerning shortages in the office. He said that sometimes he would ask appellant if they were covering shortages when turning in a destruction certificate, and appellant would respond with a "shrug." He would then inflate the stock figures and appellant never returned them as incorrect.

[5] Appellant submitted a copy of selected portions of Morini's testimony given at appellant's criminal trial, and points out that appellant was acquitted. This claimed "new evidence" is submitted to impeach the credibility of Morini's statement. We conclude, however, that the evidence is not new evidence which was not previously available to appellant despite due diligence, 5 CFR 1201.115(a).

As discussed above, appellant could have called Morini and questioned him regarding the circumstances surrounding the giving of the statement. It is noted that appellant's attorney asked some questions of the agency's investigator regarding this issue, but did not pursue the issue by calling witnesses and questioning them in this regard. See note 3, *supra*.

Further, the acquittal of appellant of the criminal charges does not of itself impeach the credibility of the statements. The reason for the jury's acquittal is unknown, and, in any case, the standard of proof applicable to a criminal prosecution as opposed to an agency action under 5 U.S.C., Chapter 75 renders comparison of the results invalid in this case.

offenses. This argument was presented to the presiding official but was found unpersuasive because:

> The other two men who were merely members of the committee, were not supervisory or management officials whereas he controlled the committee by having the stock and certificates delivered to him directly by the window clerks. . . . The appellant as Manager, Customer Service (sic) was both a supervisor and, as far as the financial operations . . . were concerned, acted in a management capacity. *Additionally, he was charged with violation in connection with the auditing of stamp credits.* Initial Decision at 8. (Emphasis added)

We agree with the presiding official's conclusion, and note further that six other employees in appellant's Post Office were discharged by the agency because of their involvement in the misuse of destruction certificates. The additional employees discharged were clerks whose accounts were short. Appellant, as the clerks' supervisor, was responsible for reporting the shortages, as well as verifying the amount of stamps which were purported to have been destroyed. His duties were central to the practices described.

On the other hand, the other two Committee members had no involvement with accounts. One was a carrier, the other worked in the vehicle maintenance section. Their offense, signing certificates without counting all the stamps, is distinguishable from the more involved offenses of appellant, and does not support the claim that appellant was subjected to a greater penalty for like offenses. While appellant was Chairman of the Committee whose members received suspensions only, his responsibilities were far more closely related to those of the six clerks who were also removed.

V. CONCLUSION

The initial decision is MODIFIED as noted above, and, as modified is AFFIRMED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from date of this order. 5 CFR 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *September 23, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DANNY CUELLAR
v.
U.S. POSTAL SERVICE

Docket No.
SF075299048

OPINION AND ORDER

This matter comes before the Merit Systems Protection Board by petition of Danny Cuellar for review of initial decision No. SF075299048, in which the presiding official found that petitioner's appeal of the removal action taken against him by the U.S. Postal Service was not timely filed.

The petitioner was removed from his position effective May 7, 1979. He appealed to the San Francisco Field Office of the Board by letter dated June 20, 1979, which was received by the Field Office on June 27, 1979. Under section 1201.21 of the Board's then effective interim regulations, the date of receipt by the field office was considered the filing date. In his initial decision of July 27, 1979, the presiding official dismissed the appeal because it was not filed within the regulatory time for filing, 20 days after the effective date, and because he found that the stated reasons for not filing a timely appeal did not constitute a showing of good cause.

The petitioner seeks review by the Board under authority of 5 C.F.R. 1201.115(a), which provides that the Board may grant a petition for review when it is established that "new and material evidence is available that, despite due diligence, was not available when the record was closed." In support of his petition, he stated that he "did not and has not" received the agency's decision on the proposed removal action against him. However, in rebuttal, the Postal Service provided photocopies of PS Forms 3811 certifying delivery to and acceptance of the Postal Service's April 19, 1979 letter of decision at his Garden Grove, California, address on April 23, 1979 and at his Santa Ana, California, address on April 26, 1979. In addition, the petitioner originally admitted that he received the letter of decision. Neither did the petitioner take issue with the validity of the return receipts provided by the Postal Service. The Board therefore finds that the preponderance of the evidence supports a conclusion that the Postal Service delivered its decision to remove the petitioner prior to the effective date of his removal. The Board concludes that the petitioner has not established that new and material evidence is available that would have justified his failure to file an appeal within the regulatory time period, and accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board on this case. The petitioner is hereby notified of his right to file a civil action in an appropriate circuit of the United States Court of Appeals or the Court of Claims within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 23, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN A. HAWKINS
v.
VETERANS ADMINISTRATION

Docket No.
DE075209042

OPINION AND ORDER

Petitioner, a Medical Administrative Assistant with the Veterans Administration Hospital, Denver, Colorado, filed an appeal with the Board's Denver Field Office from an agency action involving an alleged involuntary retirement. The appeal was filed 10 months after the effective date of the "retirement."

Petitions for appeal to the Board must be filed within twenty days after the effective date of the action being appealed. 5 C.F.R. 1201.22. The requirement for timely filing may be waived by a presiding official for "good cause shown." 5 C.F.R. 1201.12.

Since the appeal in this case was filed ten months after the effective date of the action, the presiding official afforded petitioner an opportunity to show cause why his appeal should not be dismissed as untimely. After duly considering his response, the presiding official issued an initial decision wherein he found that good cause for the delay had not been shown, and he dismissed the appeal as not having been timely filed.

The petition for review has stated the petitioner did not know of his appeal rights and that his failure to contact a union representative was lack of confidence in the organization. The agency has responded that the petition does not meet the criteria of 5 C.F.R. 1201.115.

We find that the issue of the timeliness of the instant appeal is controlled by the case of *Alan McCormack v. United States*, 204 Ct. Cl. 371 (1974); by *Beatrice Spiegel v. Department of the Army*, 2 MSPB 307 (1980) and by *Dorothy Chiarelli v. Treasury*, 3 MSPB 75 (1980). Accordingly, we hereby GRANT the petition for review in order to consider appellant's timeliness of appeal in light of those cases.

We relied upon the *McCormack* case, *supra*, in order to excuse the untimeliness which existed in the *Beatrice Spiegel* and *Dorothy Chiarelli* cases, *supra*. In *McCormack*, the court held that where a non-probationary federal employee takes an action (in that case, a resignation) which appears to be voluntary, but, where the government knew or should have known that the employee considered the action to be involuntary, then the government, while it need not acquiesce in the employee's view, must at least inform him or her of the administrative rights attaching to such an involuntary action. The court held that absent such advice, the rule that the delay in appeal will be excused is applicable. The Court then excused the nearly 11-month delay which had existed in that case.

Upon review, we find that the agency was put on notice that petitioner did not consider his retirement voluntary. *See* petitioner's letter of April 16, 1979, to the Inspector General and agency's letter of May 8, 1979, to petitioner acknowledging referral of April 16 letter. We hold that upon learning that petitioner did not consider his request for retirement voluntary, the agency should have informed him of his appeal rights and the time limits imposed on the exercise of such rights. As the agency failed to give appellant the appropriate advice, we find that the delay in the submission of the appeal has been justified for good cause. 5 C.F.R. 1201.12.

Accordingly, the petition for review is GRANTED, and the initial decision is REVERSED and REMANDED for processing in accordance with this Opinion and Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 23, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ADAM R. KLIMEK v. DEPARTMENT OF THE ARMY	Docket No. PH075299078

OPINION AND ORDER

Adam R. Klimek, appellant, was suspended for fourteen (14) specifically identified working days effective July 26, 1979, for insubordination, impertinence, argumentative and inappropriate behavior, and unauthorized absence from duty. Appellant filed an appeal which the presiding official dismissed on the basis that suspensions of 14 days or less are not appealable to the Board. Appellant petitioned for a review of the initial decision.

The Office of Personnel Management (OPM), pursuant to 5 U.S.C. Section 7701(e) and 5 C.F.R. Section 1201.114, petitioned the Board for a review of the initial decision. OPM submitted a brief in support of their petition to reopen the initial decision, and contended that the presiding official erroneously assumed that the "day" referenced in 5 U.S.C. Sections 7503, 7512, and 7513 meant working days instead of calendar days.

The agency responded to the brief submitted by OPM and took the position that appellant was suspended only for fourteen (14) calendar days, even though they were not successive calendar days. The agency contended that only designated days of suspension should be counted in determining the fourteen (14) day period.

OPM submitted a supplemental memorandum wherein they took the position that it was the clear intent of Congress to establish a single pay period as the line distinguishing between those suspensions that are appealable to the Board and those which are not.

The agency submitted a response to OPM's supplemental memorandum wherein they disagreed with OPM's interpretation of the intent of Congress.

The issue presented is whether a suspension for 14 working days, which days are specifically identified and are not consecutive, falls within the 14 day limitation of 5 U.S.C. Sections 7501-7504, and is therefore not appealable to the Board.

5 U.S.C. Sections 7512 and 7513 provide that suspensions for more than 14 days are appealable to the Board. 5 U.S.C. Sections 7501-7504 cover suspensions for 14 days or less and do not provide for appeals to the Board. These statutory provisions do not

specifically indicate whether the 14 day period is measured by calendar days or working days. However, 5 C.F.R. Section 752.201(c), published August 10, 1979 in 44 Fed. Reg. 47032, regarding suspension under 5 U.S.C. Section 7501 of 14 days or less, reads:

> (c) *Definitions*. In this subpart, *Day* means calendar day. Suspension has the same meaning given in 5 U.S.C. 7501(2).

An identical definition is given in 5 C.F.R. Section 752.402 regarding suspensions under 5 U.S.C. Section 7512 for more than 14 days. The same definitions were contained in the January 16, 1979 interim issuance of these regulations.

A suspension is defined at 5 U.S.C. Section 7501(2) as:

> The placing of an employee for disciplinary reasons, in a temporary status without duties and pay.

The notice of suspension informed appellant that the suspension was for July 26, 27, 30, 31 and August 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 1979, and that he would remain in a duty status until close of business July 25, 1979. Standard Form 50, submitted by the agency as an exhibit, documents the effective date of suspension as 07-26-29, and the nature of the action as "Suspension NTE 08-14-79."

The agency argues that its action in suspending Mr. Klimek for 14 working days, which days were specifically identified and listed in the Standard Form 50 attached to the decision letter given Mr. Klimek, falls within the 14 days limitation of 5 U.S.C. Sections 7501-7504 and is therefore not appealable to MSPB.

Regulations in effect prior to the Civil Service Reform Act defined "days" of suspension as "calendar days and not workdays." 5 C.F.R. 752.102 (1978). The legislative history of the Civil Service Reform Act clearly indicates Congress intended to make clear this definition, for the Report of the Committee on Post Office and Civil Service on H.R. 11280, House Report No. 95-1403, 95th Congress, 2d Session (1978), stated at page 21:

> The new subchapter 1 of Chapter 75 relates to suspensions from a pay status for a period of 14 days or less. Under existing law, suspensions of not more than 30 days are not considered adverse actions for the purpose of employee appeals. The committee recommends that the 30-day period be reduced to 14 days, which constitutes one full pay period in the executive branch. The committee believes that a suspension of more than one full pay period is a penalty of such magnitude that an employee should have a right of appeal.

Mr. Klimek was suspended for 14 working days. This suspension exceeded 14 calendar days and covered more than one full pay period. Therefore, appellant has the right to appeal the suspension to this Board.

The initial decision dated August 28, 1979, is hereby REVERSED in its finding that this action was not appealable to the Board, and the case is REMANDED to the presiding official for further processing and adjudication.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 23, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN F. LEONARD
v.
U.S. POSTAL SERVICE

Docket No.
BN075299011

OPINION AND ORDER

Appellant was removed from his position as a Part-Time Regular Distribution Clerk, Lowell, Massachusetts, Post Office, based on a charge that he failed to report for duty on forty-six (46) occasions.

Appellant made both written and oral responses to the advance notice stating that he could not work his 6 to 10 p.m. shift at the Lowell Post Office due to a schedule change in his full-time employment with General Electric Company in Lynn, Massachusetts, and offering instead to work an alternative shift at Lowell.

On April 2, 1979 the deciding official issued a decision in which he found that the charges were fully supported and, accordingly, appellant was removed.

Appellant submitted an appeal from this decision to the Boston Field Office in essence requesting some kind of relief so that he might be able to hold both positions. In his initial decision the presiding official found that management's position was reasonable and that management has the responsibility for deciding when employees are needed.[1] Accordingly, he concluded that the action of the Postal Service in effecting appellant's removal was for such cause as will promote the efficiency of the service and, therefore, sustained the action.

The appellant has raised two issues in his petition for review. Specifically, he contended that the presiding official failed to consider and analyze the substance of his written appeal. He also submitted, as new and material evidence, a letter dated July 27, 1979, in support of his claim that the agency knew of imminent shift changes and could have temporarily reassigned him to another work shift at Lowell. The agency's response to the petition contended that appellant was removed from his position because he failed to report for work as scheduled and that his ability to report to work in the future, at his convenience, is not sufficient justification for reversal of the removal action.

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[1] Management's position was expressed in a letter dated April 17, 1979 to the union Chief Steward in response to a grievance filed by appellant. The letter stated, in part: "Management's position is that Mr. Leonard has a schedule which we expect him to maintain. Mr. Leonard's position outside the Postal Service is his first priority as indicated by his failure to report to work at the Post Office. We did not change his schedule, General Electric did, thus, creating the situation where Mr. Leonard does not report to work here."

We consider, first, appellant's contention that the presiding official failed to consider his written appeal. In this respect, 5 C.F.R. Section 1201.111(b)(1) states that the initial decision of the presiding official shall contain findings of fact and conclusion, as well as the reasons or bases therefor, upon all material issues of fact and law presented on the record.

The initial decision of the presiding official fails to meet this standard only if it is assumed that the regulation requires responses to each theory or speculation advanced by the appellant. However, the initial decision does contain findings of fact and conclusions upon the *material* issues of fact and law in the record.

The Board finds that appellant has not made a showing of error in this regard. Our review of the record shows that the presiding official responded specifically and fully to the major issues in the appeal; that is, the reasons that appellant was removed from his position. It is undisputed that the agency separated appellant for failure to appear for work; and it is also undisputed that the only reason that the appellant did not appear for work was because he had to be at his full time job at the General Electric Company during the same hours. The presiding official did not specifically discuss appellant's contentions that management was being inflexible by refusing to accommodate his situation and temporarily change his work schedule. We find no reversible error in the presiding official's failure to address each contention of that nature in the appeal.

Turning to the allegation that the letter dated July 27, 1979, regarding excess positions in the Lowell Post Office, constituted new and material evidence which indicated that the presiding official's findings on the merits of the appeal are in error, we note that, while this letter may be new evidence, it is irrelevant to the major issue of the case. As a result of his employment with General Electric, appellant was prevented from performing his government duties due to his unavailability for work. The fact that the agency may have been contemplating establishing a new facility and might have been able to accommodate appellant in the future by changing his work schedule neither obligated the agency to forego its current staff needs nor to disrupt its workforce by reassigning the appellant and another agency employee.

Appellant has not set out reasons why the presiding official's factual determination is incorrect; nor has he demonstrated how the July 27 letter indicates error on the part of the presiding official.

Accordingly, we disagree with appellant's assertion that the July 27, 1979 letter constitutes new evidence indicating an error in the decision of the presiding official. We find, therefore, that the appellant has not made a showing consistent with 5 C.F.R. Section 1201.115(b), which requires a demonstration that the initial decision is based on an erroneous interpretation (or application) of statute or regulation.

CONCLUSION:

In consideration of the above, the Board therefore finds that the appellant has failed to show that the initial decision represents a misapplication of law or regulation. Accordingly, the petition is DENIED.

This is the final decision of the Merit Systems Protection Board.

Appellant may seek review of the Board's decision in an appropriate circuit of the United States Court of Appeals or in the Court of Claims within 30 days of receipt of the final decision of the Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 23, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALVAN T. MAJORS
v.
UNITED STATES POSTAL SERVICE

Docket No.
DC075209015

OPINION AND ORDER

Appellant was removed for scheme failure, and that action was sustained by the Board's Washington, D.C. Field Office. He filed a timely petition for review, and the agency has responded.

Appellant had been assigned to the Letter Sorting Machine (LSM)—Outgoing Primary scheme for over five years, when he was reached for promotion to a distribution clerk machine position pursuant to provisions of the National Agreement with the Postal Unions. Appellant failed to qualify on the scheme required of the new position. The fact that appellant failed to qualify on the required scheme, despite having received training and having been allowed to take the examination several times, was not in dispute. Thus, the presiding official found that the agency had proven the charge of scheme failure by a preponderance of the evidence.

The presiding official examined appellant's contentions that the agency had been wrong to require him to qualify for a scheme on which he had not bid, and that his switch from one scheme to another had been due to racial discrimination and reprisal for his having won a grievance. Appellant's petition contains no argument with the presiding official's conclusions regarding those allegations; therefore, those conclusions are not now under our review.

The petition contains four bases for the requested review; two of the matters raised had been raised on appeal,[1] but were not discussed in the initial decision, one is claimed to be new evidence, and the last is directed to the issue of whether appellant's removal had been for such cause as will promote the efficiency of the service. The presiding official made no finding as to whether appellant's removal was for such cause as will promote the efficiency of the service, although 5 U.S.C. 7513(a) mandates such a finding. We hereby GRANT the petition for review in order to review appellant's assertions, and in order to determine whether appellant's removal had been taken for such cause as will promote the efficiency of the service.

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[1] However, we note that they were raised in a separate letter accompanying the appeal, rather than on the appeal form itself.

Appellant claimed that as a Vietnam veteran he had been entitled, after one year's satisfactory performance, to conversion from part-time flex worker to full-time regular employee pursuant to regulatory provisions concerning veterans' readjustment appointments. He alleged that had that been done, he would not have been reachable for the position which resulted in his scheme failure. The agency responded, correctly, we find, that appellant had been hired from a competitive register and was not serving in a veterans' readjustment appointment pursuant to 5 C.F.R. Part 307; hence, the issue of the agency's compliance with veterans' readjustment appointment provisions was not material. We note, however, that even had appellant been placed in his position pursuant to a veterans' readjustment appointment, the result he described would not necessarily have ensued.[2]

Next, appellant claimed that another employee, having less seniority, had been promoted ahead of him. The agency responded that when appellant had been slotted for the new position, management had no way of knowing that a vacancy would later occur in his former craft, the Outgoing Primary scheme full-time positions. We note that the employee in question was promoted to that vacant position six months *after* appellant had himself been promoted, contingent upon his scheme qualification. In short, we find that appellant, having more seniority, was promoted ahead of the other employee, and that there is no causal connection between the other employee's promotion and appellant's removal.

Appellant's petition also contained an allegation of disparate treatment. This allegation had not been raised on appeal, but was offered in the petition as new evidence. 5 C.F.R. 1201.115(a). The agency responded that the allegation did not meet the criteria necessary for Board review of initial decisions on the basis of new evidence. The agency also responded to the merits of the allegation. Appellant's claim of disparate treatment was based upon the fact that the agency had cancelled the proposed removal of another employee who had also failed to qualify on the scheme in question. We find that the allegation that appellant had received disparate treatment as compared with the other employee is not new evidence which could not have been discovered, with due diligence, before the record was closed. Appellant's submission shows that the proposal to remove the other employee was rescinded on

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[2] An explanatory outline of the program, the purpose of which is to afford on-the-job education and training to Vietnam-era veterans appointed under its terms, can be found in FPM ch. 307 (July 24, 1975).

July 26, 1979. The record was not closed by the presiding official until October 19, 1979. Accordingly, we decline to examine the merits of this allegation.[3]

Finally, appellant claimed that rather than remove him, the agency should have allowed him to return to his prior position. Appellant alleged that he was highly qualified on the prior scheme, citing scores of 98.0, 98.4, and 98.0 on pertinent examinations. The agency has not disputed appellant's claim that he was highly qualified on the prior scheme.

As a general rule, the efficiency of the service may not be promoted where an agency moves an employee out of a job he is skilled in, places him into a job he cannot handle, and then removes him. However, legitimate management reasons can underlie such a result in some cases.[4] In the instant case, appellant has not disputed the agency's assertion that he was reached for the new position pursuant to applicable terms of the National Agreement. We find that the agency's adherence to the National Agreement was a legitimate management reason for appellant's contingent promotion. We find that the National Agreement contemplates the gradual promotion of part-time flex workers to full-time employees in order of seniority as vacancies occur, and that the agency complied with that general plan when it reached appellant for the position in question.

However, our inquiry is not at an end. We find that appellant, due to the extreme difficulty he was having with learning the new scheme, formally requested that he be allowed to return to a position in his former scheme (letter of July 13, 1979). The agency's only response, apparently, was to institute the instant removal action. The agency reached appellant for promotion pursuant to Regional Instructions Filing No. 719, which states that its purpose is to implement changes involving letter sorting machine operations as a result of the 1975-1978 National Agreement. The Instruction provides, *inter alia,* that an employee's failure to learn the new scheme upon his contingent promotion would render him subject to disciplinary action "in accordance with the M-54 Handbook and Article XVI of the National Agreement." Our difficulty is that those documents were not introduced into evidence, nor has the agency alluded to their contents in any way.

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[3] We likewise decline to examine the unidentified documents submitted by the agency along with its response to the petition, as they also fail to qualify as new evidence.

[4] As, for example, where the position is found to be one in a progression of training positions, such that qualifying for the next step is part of the job. *See Edward J. Sullivan and Elwood V. Wilson v. United States,* 189 Ct. Cl. 191 (1969).

The record is silent as to whether appellant's return to his prior scheme was a viable disciplinary action which the agency could have chosen, contractually and/or practically. Yet part of the agency's burden is to demonstrate that reaching appellant for the new position and then removing him for scheme failure promotes the efficiency of the service more than would his retention in or return to his former position. *See McClelland v. Andrus*, 606 F. 2d 1278, 1291 and note 61 (D.C. Cir. 1979); *Howard v. U.S.*, No. 77-219 at 15 (D. Nev. June 30, 1980). It may well be that appellant's return to his prior position was not possible due to the operation of applicable provisions of the National Agreement, or because there were no vacant slots for him there. If such were the case, the agency could easily have included a statement to that effect in its appeal file. In this case, in the absence of any explanation for the agency's non-allowance of appellant's request to return to his prior scheme, and, in the absence of any proof of the contents of the documents referenced in the Instruction as dealing with the disciplinary action which is to be imposed in cases of scheme failure, we are unable to find that appellant's removal is for such cause as will promote the efficiency of the service. In other words, we do not find that the National Agreement, as proven by the agency in this case, requires a result different from the one we would reach in any other case calling for our application of section 7513.[5] That is, we find that the efficiency of the service has not been promoted where, as here, the agency slotted an employee out of a job in which he had performed well for five years, into a position which he could not handle, and then removed him.

Accordingly, appellant's removal was not taken for such cause as will promote the efficiency of the service, and the initial decision is hereby REVERSED. The agency is hereby ORDERED to cancel the removal action, and to furnish evidence of compliance to the Washington, D.C. Field Office within ten (10) days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 23, 1980*

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[5] In *Alsbury v. USPS*, 530 F. 2d 852, 854 at note 2 (9th Cir., 1976), *cert. den.* 429 U.S. 828, the court held that the abolition of the Post Office Department and the creation of the Postal Service had not altered the legal standards under which discharge proceedings are to be evaluated. The court specifically noted the continuing applicability of the efficiency of the service standard.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MARTIN W. SCHWARTZ
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
NY083109003

OPINION AND ORDER

Appellant was denied a requested disability retirement annuity by the Office of Personnel Management (OPM) because he did not meet the requirements of 5 U.S.C. 8337.[1] He filed an appeal from this action with the Board's New York Field Office alleging that his application was for an injury sustained during the performance of official duties as a criminal investigator. The presiding official sustained the agency's action since the appellant did not meet the legal requirements of 5 U.S.C. 8337.

In the petition for review, appellant has contended: (1) that the presiding official held a hearing in appellant's absence after previously ruling that he was entitled to a hearing; (2) that the presiding official refused to admit alleged relevant evidence and failed to disclose the purpose of the hearing or the evidence required; (3) that the presiding official acting with malice and personal bias against the appellant ruled contrary to law; and (4) that the presiding official and his supervisor failed to act properly on appellant's challenge to the presiding official.

The initial appeal in this case was filed July 10, 1979, and a hearing was requested August 29, 1979. This request was granted by the Field Office, and a hearing was scheduled for November

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[1] 8337. Disability retirement.

(a) An employee who completes 5 years of civilian service and is found by the Office of Personnel Management to have become disabled shall be retired on his own application by his agency. A Member who completes 5 years of Member service and is found by the Office to have become disabled shall be retired on his own application. An annuity authorized by this section is computed under section 8339 of this title.

(b) A claim may be allowed under this section only if the application is filed with the Office before the employee or Member is separated from the service or within 1 year thereafter. This time limitation may be waived by the Office for an employee or Member who at the date of separation from service or within 1 year thereafter is mentally incompetent, if the application is filed with the Office within 1 year from the date of restoration of the employee or Member to competency or the appointment of a fiduciary, whichever is earlier.

19, 1979. Before the hearing, OPM filed a brief challenging the appellant's right to a hearing in this matter. Appellant also requested a postponement because pertinent evidence would not be available on the scheduled date. The presiding official informed the parties of the need to set up a hearing due to the lengthy pendency of the appeal. Appellant informed the presiding official that he would not be available during the third week of December due to scheduled court appearances and would be on vacation the fourth week of December. Appellant then requested a date during the third week of January 1980. The presiding official informed appellant by telephone and in writing that this time would not be reasonable under the circumstances and set the date initially for January 4, 1980 at 8:00 A. M. This time was later changed to 3:00 P. M. to accommodate appellant's objection to the early hour.

The Board's policy that its rules shall be applied in a manner which ensures that each case is processed expeditiously, but with due regard for the rights of all parties, is set forth in its regulations at 5 C.F.R. 1201.11. It is further the Board's policy that *initial* decisions in all appeals under 5 U.S.C. 7701 will be issued within 120 days of the filing of the appeal.

With respect to postponement of a hearing, the Board's regulations provide that requests for postponement "shall be made in writing and accompanied by an affidavit setting forth the reasons for the request and shall be granted only upon a showing of good cause."[2] Appellant's objection to the January 4 hearing was a request for removal of the presiding official and a statement that he would not be returning to work until January 9, 1980. An affidavit setting forth the reasons for the request was not submitted. Based on the facts shown by the record, the Board finds that the presiding official correctly denied the request for another postponement and proceeded with the hearing.

As for the second contention concerning the presentation of evidence, the presiding official informed the appellant by letter, dated December 28, 1979, of the relevant issues to be discussed at the hearing and of the type of evidence required. He informed the appellant that any evidence regarding his injury was not relevant at this point. Under 5 C.F.R. 1201.61 (1979), the presiding official may exclude evidence if it "is irrelevant." Since the issue was appellant's eligibility under the OPM retirement laws for disability retirement benefits,[3] the Board finds that the presiding official correctly excluded this evidence.

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[2] 5 C.F.R. 1201.51 (1979).

[3] Apart from any question of whether appellant had become disabled, OPM had determined that appellant did not qualify under 5 U.S.C. § 8337(a) as an employee who had completed 5 years of civilian service and also did not

Appellant has alleged bias and malice on the part of the presiding official based on a disagreement of "voluble and verbally violent proportions on the telephone." The appellant, however, has not referred to anything in the record other than the allegedly incorrect ruling to support his charge of bias. It is well settled that an incorrect ruling by a presiding official standing alone is not evidence of bias. See *In the matter of King*, 1 MSPB 144 (1979). Thus, appellant has failed to state a reason which would cause us to review the record for bias, even were we of the opinion that the presiding official's ruling was in error.[4] Therefore, this purported basis for review of the initial decision is insufficient.

In his final contention, appellant has raised the failure of appropriate parties to act on a request for the presiding official's removal. Consistent with section 1201.42(c) (1979) of the Board's regulations, the presiding official denied the request and informed the appellant of his decision. Since the appellant did not request certification of the issue to the Board at the time, the presiding official properly proceeded to hold the hearing.

Appellant has not presented any new and material evidence nor has he shown any erroneous interpretation of statute or regulation. Therefore, he has failed to meet the criteria for review under 5 C.F.R. 1201.115 (1979).

Accordingly, the petition for review of the initial decision is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days from receipt of this decision by appellant.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 23, 1980*

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qualify under § 8337(b) by filing his application within one year of separation. Since these determinations, if correct, would render unnecessary any decision of whether appellant had become disabled, the presiding official properly exercised his discretion under 5 C.F.R. § 1201.41(b)(5) to regulate the course of the hearing so as to exclude appellant's alleged disability from consideration unless it could first be established that appellant met the other statutory requirements. With the issues so limited, evidence relating to the alleged disability was immaterial at that stage of the proceeding.

[4] *Weaver* v. *Department of the Navy*, 2 MSPB 297 (1980) at 300.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MAURICE J. BIZE
v.
DEPARTMENT OF THE TREASURY

Docket No.
DA075299037

OPINION AND ORDER

The appellant is a Criminal Investigator, GS-12, with the Internal Revenue Service, Baton Rouge, Louisiana. He was suspended for 30 days for failure to safeguard his pocket commission and enforcement badge and failure to prevent them from being improperly used. He appealed to the Board's Dallas Field Office. In the initial decision, issued September 17, 1979, the presiding official found the reasons for the action supported by a preponderance of the evidence and sustained the suspension action. The petition for review set forth some 21 asserted errors or exceptions to the initial decision. The assertions shall be discussed individually below. The petition also asserted that in regard to one issue new evidence has been obtained. The agency responded to the petition and argued that the presiding official did not err and that the criteria for reopening set forth at 5 C.F.R. 1201.115 have not been met. Appellant's attorney filed a rebuttal to the agency's response but the Board's regulations do not provide for submissions beyond the petition for review and response to the petition. There has been no showing that the normal procedure should be waived. That is, appellant neither requested permission to make the additional submission nor made a showing as to its acceptability as previously unavailable evidence. Accordingly, the rebuttal submitted on behalf of appellant has not been considered.

The reasons on which the appellant's suspension was based grew out of an incident which occurred at the Alexandria, Louisiana Airport on the night of December 26, 1977. The appellant was not on duty on that date. Following a family dinner at his grandmother's home, the appellant took his uncle, Samuel O. Foster, to the airport for a return flight to his home in California, first stopping for some drinks.

Though some of the details and circumstances are in dispute, as will be seen, it is clear that the appellant and his uncle arrived at the airport some time before the flight was scheduled to depart. The airline ticket agent told them the flight was delayed. The appellant and his uncle went for some drinks rather than wait at the airport. Ultimately, upon return to the airport, Mr. Foster found he had missed his flight and in the ensuing arguments with airline personnel he displayed the appellant's pocket commission to the airline ticket salesperson to show he was not "without influence."

In March, 1978, the airline official contacted his congressman to complain about the incident. After congressional inquiry concerning the matter, the Internal Revenue Service had it investigated. After the "Report of Investigation" was submitted, adverse action against the appellant was initiated.

The appellant was specifically charged with:

> 1) Failure to adequately safeguard his pocket commission and enforcement badge, in violation of IRM 0735.1, Text 223.7.
>
> 2) Failure to prevent his pocket commission and enforcement badge from being improperly used in violation of IRM 0735.1, Text 223.7.

The agency presented the incident in the specification to reason 2 as follows:

> On December 26, 1977, your pocket commission and enforcement badge were used by Mr. Steve Foster, your uncle, to intimidate Mr. Bruton Dawkins, an airline official. You were present when the incident started; you saw that Mr. Foster had your pocket commission and enforcement badge in his hand while he was berating the airline official. You did not retrieve your credentials during the altercation or restrain Mr. Foster for having improper possession of them. They were subsequently used by Mr. Foster, after you had left the scene, to intimidate the airline official.

The appellant said that he was unaware that his uncle had his badge, and that as soon as he found out he escorted his uncle out of the terminal.

The appellant alleged a number of errors in his petition for review. In consideration of our findings concerning appellant's right to discovery, the petition is hereby GRANTED. The first two of appellant's arguments are general in nature and essentially summarize the more particularized allegations of error which follow. Accordingly, the Board will consider allegations 1 and 2 below.

Allegation 3 is that the presiding official erred in denying appellant's request to call seven witnesses who would have testified about the lack of training concerning procedures in safeguarding credentials. The argument is also set forth in item 19.

The presiding official denied the request for witnesses because "whether the appellant or other special agents of the agency were instructed . . . in procedures for safeguarding credentials is not considered material to the issue of whether appellant did so" in this case. He also noted that one of appellant's approved witnesses, a security officer, could testify on this issue.

In the initial decision, the reason for the denial was repeated, but the presiding official also found that "the agency took adequate measures to train and to inform the appellant concerning the proper rules of conduct for safeguarding his credentials." The appellant argued that this finding belies the ruling that the proffered testimony was immaterial, and that the appellant did not have an opportunity to present his evidence in this regard.

Although some of appellant's requested witnesses were disapproved, we conclude there was sufficient testimony regarding instructions about safeguarding credentials. The appellant's supervisor testified for the agency in this regard; the security officer, appellant's witness, and appellant also testified on this issue. Notably, the presiding official allowed appellant to testify about his conversations with other agents concerning the lack of training.[1] Additional testimony on this subject would have been repetitious and unnecessary. See 5 C.F.R. 1201.62(a).

Throughout the proceedings the attorney for appellant has made much of the fact that appellant was never told specifically that he should not lay his badge on the dashboard or seat of his car in the presence of a relative. The attorney felt the witnesses were necessary to prove that appellant had never been told that such action was prohibited. We agree with the presiding official's conclusion that the testimony was immaterial as to this issue. In fact, the agency does not allege there was any such instruction.

The charge against appellant was not that he violated a mandated procedure for safeguarding his badge, but that, in effect, he failed to maintain proper control over his badge. Obviously it would be impossible for the agency to anticipate every factual situation in which an agent might find himself and train the agent as to what he or she should do under each of these circumstances.

What is material to this issue, however, is whether appellant had been informed that he was to safeguard his credentials. It was clearly established that appellant knew he was to exercise care to maintain control over his credentials. See appellant's testimony, at 231-33, 280 and 281. Therefore, the finding that the agency informed and trained appellant in this regard does not conflict with the conclusion that it was immaterial that the agency had not given appellant specific instructions on how to act in a situation similar to that which occurred on December 26, 1977.

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[1] Hearing Transcript at 230-34.

Allegation 4 is that the presiding official erroneously refused to order the agency to produce the "Report of Investigation." The report was prepared by an inspector of the Internal Security Division of the IRS. The proposing official, Mr. Hinchman, testified that he received the report,[2] but on cross-examination it appeared that he may have relied only on portions of the report. The deciding official did not see the whole report.[3]

In a pre-hearing motion, appellant had initially requested the presiding official to order the agency to produce the entire report. See "Appellant's First Request for . . . Documents", dated July 10, 1979. The agency's position was that it did not rely on the full report and that appellant was supplied with the pages of the report on which it relied—pages 3, 4, 9, and 10. Therefore, the agency contended, since the appellant was not entitled to more than the material relied on, the request was irrelevant. See "Objections to Appellant's Request for . . . Documents." The presiding official denied appellant's request for the report because it was not necessary to a decision in the case. See letter of July 16, 1979.

The appellant's request for production of the investigation report has been evaluated throughout the proceedings in terms of compliance with 5 C.F.R. 752.404(b), which gives an employee the right to review material which the agency relied on to support a proposed action. While there was some uncertainty about which material the proposing official relied on (see discussion of allegation 16, *infra*), the finding that the appellant received the pertinent pages of the investigation report is supported by the evidence. However, we conclude that 5 C.F.R. 752.404(b) was erroneously interpreted as limiting appellant's right to only that evidence on which the agency relied.

5 C.F.R. 752.404 speaks to the procedures which an agency must follow when proposing and executing an action under 5 U.S.C. 7513. The section 752.404 process does not, and was not intended to, provide an employee an adversary hearing with all the concomitant rights that such a process connotes. Section 752.404 guides an agency during its processing of a 5 U.S.C. 7513 action, but it is not a limitation upon the rights of appellants in appeals under 5 U.S.C. 7701 and accompanying regulations.[4]

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[2] Hearing Transcript at 140.

[3] Hearing Transcript at 110-11.

[4] When considering the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), the Senate Committee on Governmental Affairs was aware that the right to review material relied on was conferred by regulation and decided not to expand this right. However, the Committee also intended

Prior to enactment of the Civil Service Reform Act, the majority view was that the right accorded employees in section 752.404(b) [5] defined what evidence an agency was required to produce. *Hoover v. United States*, 513 F.2d 603, 606 (Ct.Cl. 1975); *Heffron v. United States*, 405 F.2d 1307 (Ct.Cl. 1969). More recently the U. S. Court of Appeals, in a decision to the contrary, viewed the issue in terms of due process instead of the narrow ambit of the regulation, and held that the appellant was entitled to production of the relevant report absent any valid claim of privilege by the agency. *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D. C. Cir. 1979).

The *McClelland* decision is even more persuasive when considered in conjunction with the Board's regulations, which were not applicable to the case, since the extent of discovery procedures available in an administrative hearing is primarily determined by the particular agency. *McClelland, supra* at 1285. The Board's discovery procedures are set forth at 5 C.F.R. 1201.71 *et seq.* While a presiding official may exclude evidence from a hearing because it is repetitious, 5 C.F.R. 1201.62, there is no provision which allows for the exclusion of evidence because the agency did not rely on it.

In 5 C.F.R. 1201.75, the Board stated that guidance in discovery matters may be obtained from the Federal Rules of Civil Procedure, but that such "rules should be interpreted as being instructive rather than controlling." While it is clear that the FRCP are not of legal effect in cases before the Board, they offer guidance in the area of discovery and should be studied by presiding officials.

Particularly instructive to the issues of this case is FRCP 26(b), which sets forth the scope of discovery; it reads, in pertinent part, as follows:

> (b) Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and

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that an employee receive a full evidentiary hearing before the Board, evidence that the regulation was not viewed as limiting an appellant's right to material evidence. S. REP. NO. 95-969, 95th Cong., 2d Sess. 50, 54 (1978).

[5] 5 C.F.R. 752.202(a)(2) was the predecessor regulation and it was comparable in substance to the current regulation.

> location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears *reasonably calculated to lead to the discovery of admissible evidence.* (emphasis supplied)

Following the lead case of *Hickman v. Taylor,* 329 U.S. 495 (1947), courts have liberally interpreted the meaning of "relevant" for purposes of discovery. *See* C. Wright and A. Miller, *Federal Practice and Procedure,* section 2008 (1970 ed.). The U.S. Court of Appeals has held that evidence is relevant, for discovery purposes, as long as it is "germane" to the subject matter. *Local 13, Detroit Newspaper Union v. N.L.R.B.,* 598 F.2d 267, 271 (D. C. Cir. 1979). It should be kept in mind that relevancy for purposes of discovery is different from the question of admissibility. Thus, if evidence which is not admissible is likely to lead to the discovery of admissible evidence, it is relevant for purposes of discovery. *Rozier v. Ford Motor Co.,* 573 F.2d 1332, 1342 (5th Cir. 1978).

The Board's presiding officials have been given similar authority in relation to discovery requests. In 5 C.F.R. 1201.72, discovery is defined as "the process whereby a party may obtain information . . . for the purposes of assisting . . . in planning and developing his/her case." Evidence which assists in planning a case may or may not be admissible, but as in FRCP 26(b), it is discoverable.

Since one of the main functions of the Board is the adjudication of cases within its jurisdiction, 5 U.S.C. 1205, the fairness of such adjudications can only be enhanced by disclosure of the facts in a case. Therefore, uncertainty as to the relevancy of requested evidence should be resolved in the favor of the movant, absent any undue delay or hardship caused by such request. (See allegation 5, *infra.*)

The evidence denied appellant in this case was central to the case. The report detailed an investigation conducted into the charges which were subsequently levied against appellant, and selected portions of the report were relied on by the agency. It is reasonable to infer that the report contains summaries of witness interviews which were not disclosed to appellant. Without imputing any bad faith to the agency, it is reasonable to conclude that even if they were not exculpatory in nature, such summaries could lead to exculpatory evidence, or other witnesses. Considering that the agency had resources to conduct interviews nation-wide, access to the report would be helpful to the appellant, if for no other reason than to assist him in deciding how to commit his resources. Notably, production of the report would have placed no burden on the agency, nor would it have delayed the proceedings. Therefore, we conclude that the presiding official erroneously denied appellant's request for production of the report. Accordingly, the case must be remanded, and upon remand the presiding official should require production of the full report and, if necessary, rule on any claims of privilege advanced by the agency. See *McClelland v. Andrus, supra.* Assuming no valid privilege prevents production of the report, the presiding official must determine if further proceedings are appropriate and issue a new initial decision taking into consideration the evidence and arguments advanced after production of the report insofar as they raise matters not already fully decided herein.[6]

Allegation 5 is that the presiding official erroneously denied appellant's request for production of the passenger list of the plane which his uncle missed. The purpose of the request was to try to locate any other passenger who also missed the plane and may have witnessed the argument between the uncle and the ticket agent. While the potential evidence may possibly be relevant, we agree with the presiding official's determination that the "possibility that an unidentified passenger on that list may recall the actions of the appellant or the . . . ticket agent a year and a half later is too speculative to require" that the list be provided. Presiding official's letter of July 16, 1979. This conclusion represents a considered balance between avoidance of unproductive delay and production of essential information, 5 C.F.R. 1201.71.

Alleged error number 6 is that the presiding official violated appellant's right to a fair hearing by refusing to consider appellant's brief filed in response to the IRS's post-hearing brief. In accordance with 5 C.F.R. 1201.57(a), the presiding official allowed the parties to submit post-hearing briefs. On August 7, 1979, the presiding official sent both parties copies of the hearing transcript and informed the parties that the briefs must be postmarked no later than ten days from receipt of the transcript. Both parties submitted briefs within the applicable time period. On September 5, 1979, however, the appellant sent a response to the agency's brief. No provision had been made for the submission of responses to the post-hearing briefs.

As provided in 5 C.F.R. 1201.57(a), the record on an appeal shall be left open after the hearing only for such time as the presiding official has granted for the submission of post-hearing materials. Further, 5 C.F.R. 1201.57(c) provides that once the record is closed, no additional evidence or argument shall be accepted into the record except upon a showing that new and material evidence had become available which was not readily available prior to the closing of the record. The Board finds no such showing was made in this case. Accordingly, the Board finds that the presiding official properly excluded from consideration the appellant's response to the agency's post-hearing brief.

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[6] In items 7 and 12 the appellant argued that he did not get all the material which the agency relied on. While we concluded above that the agency did furnish the pages of the investigation report it relied on, the appellant will have an opportunity to see all material evidence even though the agency did not rely on such evidence. Therefore, the item will not be discussed further.

In item 8 the appellant asserted that the first charge in the proposal letter lacks specificity. As a follow-up to the argument, it is asserted in item 9 that the decision letter also lacks specificity, presumably because it sustained the charges as set forth in the proposal letter. Therefore, both of the items are concerned with the specificity of the charges.

In item 8 the appellant stated, "the charge, as it has been erroneously allowed to stand, announces that no matter how an unauthorized person gains control of an employee's badge, the employee violates the rules if an unauthorized person turns up with, for example, a badge." The argument, in effect, is that the charge did not specifically say the appellant was at fault.

We find no error in this regard. The reasons for a proposed adverse action must be set forth with sufficient specificity so as to allow the employee to understand what he is charged with and prepare a response. *Money v. Anderson*, 208 F.2d 34 (D.C. Cir. 1953); *Deak v. Pace*, 185 F.2d 977 (D.C. Cir. 1950); *Ricci v. U.S.*, 507 F.2d 1390 (Ct.Cl. 1974). As long as the notice meets this standard of specificity, it need not specifically state that the unauthorized use of the badge was through the appellant's fault if the consideration of the case, both in the agency and before the presiding official, reflects that the matter is actionable only if some "fault" of the appellant is involved. *Hoover v. U.S.*, 513 F.2d 603 (Ct. Cl. 1975). The Board finds that the appellant's representations throughout the case as well as the presiding official's consideration of the merits of the appeal demonstrate attempts to determine whether the appellant was at fault in the incident on December 26th.[7]

In items 10 and 11, the appellant maintained that the agency action was based on a regulation which was not in effect on December 26, 1977. The rule in effect in December 1977 provided the following:

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[7] The notes (typed and handwritten) of the oral reply indicate that appellant attempted to explain why he was not at fault. He attempted to show that the credentials were obtained and used without his knowledge. His testimony at the hearing was in the same vein, and the agency tried to establish that the opposite was true.

> 223.7 Use of Badges, Credentials and Authority
>
> Credentials and badges issued to employees are for use in establishing identity or authority in connection with official duties. Such badges, credentials, or designations, are not to be used to exert influence or obtain, either directly or indirectly, privileges, favors, or rewards for themselves or others, or to improperly enhance their own prestige.

Shortly thereafter, in 1978, Rule 223.7 was changed to read as follows:

> 223.7 Use of Pocket Commissions, Enforcement Badges, ID Cards, and Authority
>
> (1) With the sole exception of the IRS Identification Card/Badge, Form 6054, and then only to the extent noted below, pocket commissions, enforcement badges, and various identification cards issued to employees are for use only in establishing identity or authority in connection with official duties. Such pocket commissions, enforcement badges, identification cards, or employee's official position, status, or designation, are not to be used to exert influence or obtain, either directly or indirectly, privileges, favors, or rewards for themselves or others or to improperly enhance their own prestige.
>
> . . .
>
> (3) Employees are responsible for the safeguarding and proper use of pocket commissions, enforcement badges and identification cards, and for surrendering them on termination or demand by proper authorities. Any misuse, counterfeiting, alteration, or reproduction is a violation of Federal law.

The Board concludes that both rules of conduct contain a prohibition against using credentials and badges to exert influence, either directly or indirectly. Although the personnel specialist who actually prepared the proposal letter for the proposing official had the later rule in mind, the presiding official correctly found that any error in this regard was harmless. The Board cannot agree with the appellant that "careful reading" of the superseded rule reveals that it applies only to use of credentials and badges while in the employee's possession. The Board finds that the substance of the rule was relevant to the circumstances of appellant's case.

In number 13, the appellant contended that the agency violated 5 U.S.C. 2302(b) (2) in that prior to proposing the adverse action, the proposing official discussed hypotheticals with area law enforcement officials to get ideas on what discipline, if any, to propose. 5 U.S.C. 2302(b)(2) provides:

> (b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—
>
> > (2) solicit or consider any recommendation for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of—
> >
> > > (A) an evaluation of the work performance, ability, aptitude, general qualifications of such individual; or
> > >
> > > (B) an evaluation of the character, loyalty, or suitability of such individual;

The appellant asserts that the presiding official erred by interpreting the above as not prohibiting the type of conversations the proposing official had about the contemplated adverse action. The Board finds no error in the presiding official's interpretation of 5 U.S.C. 2302(b)(2). The clear language of the statute does not prohibit hypothetical discussions to give an official broader knowledge on which to base a personnel decision or recommendation. Such was the case here. There is no indication in the record that the proposing official solicited or considered any recommendation or statement with respect to the appellant individually.

Alleged error number 14 is that the presiding official "ignored numerous inconsistencies between the ticket agent's written statements and his subsequent testimony. Those inconsistencies are set out in Exhibit No. 1." Exhibit No. 1 is the initial decision and it clearly does not support the appellant's allegation. As acknowledged by the appellant, the presiding official set forth and discussed the inconsistencies in both the ticket agent's and the appellant's various statements. Consideration was given to these inconsistencies at pages 7-11 of the initial decision.

In items 15 and 17, the appellant alleged that the presiding official did not understand or interpret the evidence correctly. While the arguments go to the presiding official's interpretation of the evidence, the appellant cites nothing other than a possible alternative interpretation of the evidence to show error. We conclude that, giving due deference to the credibility assessment of the presiding official, the initial decision reflects careful consideration of the conflicting evidence and correctly applies the proper standard of proof.[8] See *Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

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[8] 5 U.S.C. 7701(c)(1)(B) requires that an agency decision be supported by a preponderance of the evidence.

In item 16 it is correctly asserted that the presiding official erroneously stated that appellant's uncle did not provide a statement or testify about the incident. The proposing official testified that he saw a statement from the uncle.[9] The uncle's statement is not part of the record and there is no explanation why it was not submitted; it is perhaps with the portion of the investigation report which was not released to appellant. Upon remand the presiding official should correct this error and the statement should be considered if relevant.

Allegation 18 is that appellant was coerced by the agency investigator. In support of this allegation, appellant advanced arguments that he had not had lunch and it was noon, and that he was going to a job interview at 1:00. Also appellant's request to tape the interview was denied, and he was persuaded by the interviewer to shorten his statement.

Appellant is himself a criminal investigator with the IRS. He had previously worked with the interviewer on tax cases, and he exhibited knowledge of interviewing techniques.[10] Any changes made in appellant's affidavit were made by him, with his approval. The presiding official concluded that the appellant's affidavit was not made under duress, and we find the conclusion to be well supported by the facts. See *Johnson v. U.S. Postal Service*, 2 MSPB 560 (1980).

The appellant also contended that new evidence is now available, specifically, "Inspector Snee, the interviewer, has told Appellant since the hearing that the interview *was coercive*, that *all of their interviews are coercive by their nature*." (Emphasis in the original.) The Board finds that this asserted new evidence does not meet the standard set forth in 5 C.F.R. 1201.115(a), that "new and material evidence is available that despite due diligence, was not available when the record was closed."

Inspector Snee testified at the hearing on this case. His opinion regarding the nature of the interview could have been solicited at that time. The Board does not find this to be "new" evidence. Moreover, it is cumulative to the appellant's arguments to the presiding official on the nature of the interview, *Kay v. Cessna Aircraft Co.*, 548 F.2d 1370 (9th Cir. 1977), which we have found unsupported.

In item 20, the appellant disputed the accuracy of the typewritten minutes of the oral reply, prepared by the proposing official's secretary. It was asserted that the handwritten notes of another employee who was present were more accurate than the stenographic notes. We see no reason to credit appellant's claim in this regard since both persons who made the notes were present. In any case, the conflicts between the notes are minor. We find no error as to this issue.

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[9] Hearing Transcript at 18.

[10] Hearing Transcript at 262.

In item 21 of the petition for review, the appellant stated that the "IRS refused to produce at hearing its regulations governing adverse actions." The argument was that the regulations require the agency to specifically set forth the reasons for the proposed action. This adds nothing to an employee's rights under 5 U.S.C. 7513, and the appellant's argument concerning a lack of specificity was raised and considered in allegation 3. Additionally, we note that the agency did not have a copy of the regulation requested by appellant at the hearing because no request was made before the hearing. We conclude that the presiding official's ruling did not impede appellant's rights and that the appellant had ample opportunity to comment on the IRS regulations. See Post-Hearing Brief of Appellant, III C and D.

Finally, as noted previously, the appellant asserted in items 1 and 2 that the presiding official erred in finding that the agency proved its case by a preponderance of the evidence, and by ignoring the regulatory violations alleged by the appellant. The specific allegations raised by the appellant were set forth in the other items of the petition and were discussed above. While we find no apparent error in the evidentiary findings made by the presiding official on the basis of the present record, we have found that the appellant should have been furnished all material evidence which was requested even though the agency claimed it did not rely on that evidence. Therefore, a remand is necessary to allow appellant an opportunity to make further presentations warranted by the evidence.

Accordingly, the initial decision is VACATED and the case is REMANDED for further consideration consistent with this Opinion.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 24, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LAVERNE CHISHOLM
v.
DEFENSE LOGISTICS AGENCY

Docket No.
PH075209043

OPINION AND ORDER

This appeal raises the issue of whether an appellant's prior criminal conviction may effect a collateral estoppel in proceedings before the Merit Systems Protection Board so that the appellant may not deny a charge upon which an agency's adverse action is based when the conviction and the agency's charge relate to the same incident of misconduct. Since the issue is a significant one of first impression before the Board, we reopened the appeal on our own motion by order dated January 3, 1980. At that time, we requested the agency and the appellant to submit briefs on the issue. The Office of Personnel Management (OPM) intervened in order to express its views as well.

In their briefs, the agency and OPM urged the application of the collateral estoppel doctrine in appeals to the Board, whereas the appellant opposed its application. We shall consider these views and supporting arguments against the factual background of this appeal.

I. BACKGROUND

LaVerne Chisholm was a warehouse Forklift Operator, WG-5, with the Defense Logistics Agency, Defense Supply Depot, Mechanicsburg, Pennsylvania. He was removed from that position by the agency on August 4, 1979, based on the charge of shoving another employee against a bin and striking her repeatedly in the stomach while the two were on duty. In responding to the removal proposal, the appellant denied the charge during a meeting with the agency's deciding official in the presence of his attorney. The agency sustained the charge, nonetheless, and effected the appellant's removal based on sworn statements from the alleged victim and two other agency employees who witnessed parts of the incident in question.

The agency acknowledged in its removal notice that its Standard Schedule of Disciplinary Offenses and Penalties for Civilian Employees allowed for a range of penalties for a first offense

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from reprimand to removal.[1] The agency explained, however, that removal was warranted in this case because the appellant's misconduct resulted in the alleged victim's medical examination and subsequent two-day assignment to light duty.

The appellant protested his removal to the Board's Philadelphia Field Office. At the hearing, the agency presented three witnesses who were agency employees—the alleged victim, an eyewitness to the incident, and a supervisor who saw the alleged victim after the incident. It was disclosed during the cross-examination of the alleged victim that she was the mother of the appellant's child and that she and the appellant had argued over child support and visitation rights. Hearing Transcript at 16-18. The agency introduced, further, uncontested plain copies of Judgment and Probation/Commitment Orders indicating that on June 22, 1979, the U.S. District Court for the Middle District of Pennsylvania found the appellant guilty of disorderly conduct and assault in connection with the same incident for which the appellant was dismissed from his employment with the agency. Hearing Transcript at 39-40.

The appellant presented two witnesses at the hearing—an agency shop steward and the appellant himself. The shop steward testified that she broke up the altercation initiated by the appellant before there was any physical contact, although she acknowledged that she could not see what was happening for about three minutes as the incident progressed. Hearing Transcript at 49-50. Finally, the appellant testified that he never made physical contact with the alleged victim during the course of the incident. Hearing Transcript at 61-62, and 64.

In an initial decision issued on November 30, 1979, the presiding official noted, "This case presents a simple weighing of the testimonial evidence to determine whether the preponderance of the evidence lies with the appellant or with . . . the alleged victim." Initial Decision at 2. He then discussed the testimony of the witnesses at the hearing, and concluded that the preponderance of the evidence did not support the agency's charge. In reversing the removal action, the presiding official made no mention of the agency's documentary evidence regarding the appellant's criminal conviction based on the same incident.

II. THE DOCTRINE OF COLLATERAL ESTOPPEL

The collateral estoppel doctrine has long been applied by federal courts to find in a civil proceeding that a prior criminal conviction of a party to the civil proceeding estops that party from denying those common factual and legal issues directly determined in the criminal proceeding.[2] *See Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 568-69 (1951); *McCord v. F. Lee Bailey*, No. 79-1085, slip op. at 6 (D.C. Cir. September 9, 1980); *Sagemino v. United States*, No. 100-77, slip op. at 20 (Ct.Cl. February 8, 1980); *United States v. Podell*, 572 F.2d 31, 35 (2d Cir. 1978).[3] In other words, the criminal conviction has a binding effect on the subsequent civil proceedings regarding the same issues.

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[1] The specific offense category was "(d)isorderly conduct; fighting; threatening or attempting to inflict bodily injury to another; engaging in dangerous horseplay; or resisting competent authority."

The traditional threshold requirements for application of the doctrine of collateral estoppel are three: (1) the issue to be resolved must be identical to that involved in the prior action; (2) the issue must have been actually litigated in the prior action; and (3) the determination of the issue in the prior action must have been necessary and essential to the resulting judgment. *See James Talcott, Inc. v. Allahabad Bank, Ltd.*, 444 F.2d 451, 458-59 (5th Cir. 1971), *cert. den.*, 404 U.S. 940 (1971); 1B Moore, Federal Practice par. 0.443(1) (2d ed. 1976). The parties in both proceedings were once required to be identical for collateral estoppel to apply, *Triplett v. Lowell*, 297 U.S. 638, 642 (1936), but such mutuality is no longer required, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971).[4]

Where the conviction involves a general verdict of the jury or judgment of the court without special findings, in order to determine what was resolved by the conviction the adjudicator of the subsequent civil action must often review the record of the criminal proceeding, including the pleadings, the evidence submitted, the instructions under which the jury arrived at its verdict, and any opinions of the courts. *Emich Motors Corp., supra,* at 569; *Mastracchio v. Ricci,* 498 F.2d 1257, 1260-61 (1st Cir. 1974), *cert. den.,* 420 U.S. 909 (1975). However, issues which were essential to the verdict or judgment must be regarded as having been determined by the conviction. *Emich Motors Corp., supra,* at 569; *Sagemino, supra,* at 20; *Kaufman v. Moss,* 420 F.2d 1270, 1274 (3d Cir.), *cert. den.,* 400 U.S. 846 (1970). Reasonable doubt as to what was decided by a prior conviction should be resolved against using it to effect an estoppel. *Kaufman, supra,* at 1274; *Northern Oil Co. v. Socony Mobil Oil Co.,* 368 F.2d 384, 388 (2d Cir. 1966).

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[2] The doctrine of collateral estoppel is distinguished from the doctrine of *res judicata* in that the former refers to issue preclusion whereas the latter concerns claim preclusion. As explained by the Supreme Court in *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955):

> (U)nder the doctrine of *res judicata*, a judgment "on the merits" in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.
> *See also Montana v. U.S.*, 440 U.S. 147 (1979).

[3] *See also Rimmer v. Fayetteville Police Dept.*, 567 F.2d 273, 276 (4th Cir. 1977); *Hooper v. Guthrie*, 390 F.Supp. 1327, 1333-35 (W.D.Pa. 1975); *Bressan Export-Import Co., Inc. v. Conlew*, 346 F.Supp. 683, 685 (E.D.Pa. 1972).

[4] *See also Lynne Carol Fashions, Inc. v. Cranston Print Works Co.*, 453 F.2d 1177, 1182 (3d Cir. 1972).

Even if mutuality were still required, however, the Supreme Court held in *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 402-03 (1940), "There is privity between officers of the same government so that a judgment in a suit between a party and a representative of the United States is res judicata in relitigation of the same issue between that party and another officer of the government." *See also Emich Motors Corp., supra*, at 569.

III. APPLICABILITY TO PROCEEDINGS BEFORE THE BOARD

In his brief, the appellant contended that the doctrine of collateral estoppel is inapplicable in administrative proceedings before the Board because the doctrine is one of judicial administration, designed to prevent redundant and unnecessary litigation. He argued that the application of the doctrine in this administrative appeal would not foster judicial efficiency.

The cases cited by the appellant in support of this argument do indeed indicate that collateral estoppel is grounded in "public policy and notions of judicial administration," as noted in *Westwood Chemical, Inc. v. Molded Fiber Glass Body Co.,* 498 F.2d 1115, 1117 (6th Cir. 1974). However, the appellant's argument fails to explain how that rationale should be limited strictly to judicial proceedings.

One of the primary missions of the Board is to hear and adjudicate all matters within its jurisdiction, issuing compliance orders where appropriate. 5 U.S.C. 1205(a). The Board's function is clearly that of ". . . a quasi-judicial body, empowered to determine when abuses or violations of law have occurred, and to order corrective action." S. Rep. No. 95-969, 95th Cong., 2d Sess. 24 (1978). Thus, considerations of judicial efficiency may apply to the Board as well as to the federal courts. The application of the doctrine in appropriate cases usually reduces the time and expense of subsequent litigation where an issue raised was already fully litigated. *See Blonder-Tongue Laboratories, Inc., supra,* at 338. This savings accrues to the parties as well as to the adjudicative body.

The appellant has contended further in his brief that the Board should be guided by the approach of labor-management arbitrators in the private sector, where judgments are made independent of prior criminal or civil proceedings. *See, e.g., Chrysler Corp.*, 53 Lab. Arb. 1279, 1282 (1969) (Alexander, Arb.); *see also* 9 U.S.C. 1 and 10. The Board finds no merit to this contention. The Board's responsibility and authority lie in the public sector, where an arbitrator's award may be deemed by the Federal Labor Relations Authority to be deficient if it is "contrary to any law, rule or regulation." 5 U.S.C. 7122(a)(1). Moreover, a decision of the Board is appealable to the U.S. Court of Claims or to a U.S. Court of Appeals, where the doctrine of collateral estoppel is applied. 5 U.S.C. 7703(b)(1); *Emich Motors Corp., supra; Sagemino, supra.*

The appellant has also asserted that the Board's application of the collateral estoppel doctrine would violate an appellant's due process rights where, as here, the criminal convictions were relatively insignificant, having resulted only in small fines,[5] while the Board's proceedings could confirm the appellant's removal from employment. This argument overlooks the fact that an adult's criminal conviction is always significant—it results in a criminal record that he or she must contend with indefinitely, and it may be a basis for disqualification for federal employment. 5 C.F.R. 731.22(b)(2). Most important, a criminal conviction indicates that the convicted person was found guilty of the crime charged beyond a reasonable doubt, whereas a civil proceeding or an administrative proceeding before the Board requires the lesser showing of the preponderance of the evidence.[6] *See Neaderland v. Commissioner of Internal Revenue*, 424 F.2d 639, 642 (2d Cir.), *cert. den.*, 400 U.S. 827 (1970); *Moore v. United States*, 360 F.2d 353, 356 (4th Cir. 1965), *cert. den.*, 385 U.S. 1001 (1967). It would, therefore, be anomalous for the Board to find that an agency did not support its charge by the preponderance of the evidence, when the agency has introduced evidence that in a prior criminal proceeding the appellant was adjudged guilty of essentially the identical charge beyond a reasonable doubt.[7] *See Shore v. Parklane Hosiery Co., Inc.*, 565 F.2d 815, 819 (2d Cir. 1977), *aff'd*, 439 U.S. 322 (1979).

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[5] The appellant was fined only $50 for assault and $25 for disorderly conduct. The maximum fine for the assault was $500 and the maximum prison sentence was 6 months. 18 U.S.C. 113(d). No statutory penalty was provided for disorderly conduct. 18 U.S.C. 13.

[6] Or, in certain proceedings before the Board, the still lesser showing of substantial evidence. 5 U.S.C. 7701(c)(1).

[7] The converse is not true, however. Acquittal does not constitute irrefutable evidence in subsequent civil proceedings that the misconduct charged did not occur. The preponderance of the evidence may still support the charge. *See Helvering v. Mitchell*, 303 U.S. 391, 397 (1938); *Neaderland, supra*, at 642; *Kowal v. U.S.*, 412 F.2d 867, 870 (Ct.Cl. 1969).

Finally, the appellant has argued that, since the Civil Service Reform Act of 1978 vests the Board with the authority to render judgment on employee removal appeals based on its full and complete review of the evidence and arguments presented to it, 5 U.S.C. 7513(d) and 7701(a), the Board would be abdicating its statutory responsibility by according binding effect to a prior criminal conviction. This assertion disregards a number of salient points. An appellant could not be denied the opportunity to demonstrate, if possible, that he or she was denied the opportunity to a full and fair defense during the prior criminal proceeding, whether procedurally, substantively, or evidentially. *See Blonder-Tongue Laboratories, Inc., supra,* at 333; *Westwood Chemical, Inc., supra,* at 1119. Such a denial would obviously vitiate the binding effect of the conviction. Moreover, despite the application of the collateral estoppel doctrine in a particular case, the ultimate determination as to whether the agency's adverse action promotes the efficiency of the service must be made by the Board. 5 U.S.C. 7513 and 7701.

Neither the agency nor OPM referred us to a case where judicial imprimatur was bestowed upon an administrative decision applying the doctrine to a prior criminal conviction. However, our own review of the history of the doctrine did disclose one reported federal decision where, in affirming the deportation order of the Immigration and Naturalization Service's Board of Immigration Appeals, a U.S. Court of Appeals acknowledged that the deportee's prior criminal conviction for assisting in the unlawful entry of other aliens, entered upon a plea of guilty, established some of the essential elements for deportation under federal statute. *See Cuevas-Cuevas v. Immigration and Naturalization Service,* 523 F.2d 883, 884 (9th Cir. 1975). The decision in that case did not indicate whether the Board of Immigration Appeals had similarly relied on the deportee's prior conviction, but it implied that the court would have approved if the Board had so relied.

In light of the foregoing considerations, we conclude that the doctrine of collateral estoppel may be invoked in cases before the Board to accord binding effect to charges leveled by an agency. The particulars of its application shall be controlled by federal judicial case law, supplemented with interpretations by the Board where development by judicial precedent is lacking.

IV. APPLICABILITY OF THE COLLATERAL ESTOPPEL DOCTRINE IN THIS APPEAL

The Judgment and Probation/Commitment Orders of June 22, 1979, which were introduced at the hearing in uncertified form without challenge to their authenticity, indicate that the appellant appeared before District Judge John Havas with the benefit of counsel, pleaded innocent, and was adjudged guilty of disorderly conduct and assault in violation of Title 18 of the United States Code, sections 13 and 113(d), respectively. Section 13 relates to disorderly conduct under state law, whereas section 113 relates to the federal crime of assault.[8] Specifically, the appellant was found guilty of "assault by striking, beating, or wounding" under section 113(d). The criminal victim was the same agency employee whom the agency charged the appellant with shoving and striking, and the incident itself was the same. Hearing Transcript at 39-40.

In his brief, the appellant sought, nonetheless, to distinguish the criminal charge from the agency's charge. He contended that the elements of the criminal charge of assault differed from those of the agency's charge of shoving and striking, in that criminal assault requires only a reasonable apprehension of bodily harm. Since the judgment in his conviction of assault does not indicate whether it relates to actual bodily harm or to a mere threat of such harm, he argued, the conviction cannot establish the elements of the agency's charge.

In making this argument, the appellant relied upon *United States v. Dupree*, 544 F.2d 1050, 1051 (9th Cir. 1976), which does hold that a criminal assault may be completed simply by causing a reasonable apprehension of bodily harm. However, that case involved a conviction under section 113(c) relating to assault with a dangerous weapon, with intent to do bodily harm. 18 U.S.C. 113. The appellant, on the other hand, was convicted under section 113(d) relating to assault by striking, beating, or wounding. *Id.* In order to have been convicted of assault under section 113(d), the appellant must have actual body contact with the assault victim, involving striking, beating, or wounding. *United States*

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[8] Section 113 provides in its entirety:

> Whoever, within the special maritime and territorial jurisdiction of the United States, is guilty of an assault shall be punished as follows:
>
> (a) Assault with intent to commit murder or rape, by imprisonment for not more than twenty years.
>
> (b) Assault with intent to commit any felony, except murder or rape, by fine of not more than $3,000 or imprisonment for not more than ten years, or both.
>
> (c) Assault with a dangerous weapon, with intent to do bodily harm, and without just cause or excuse, by fine of not more than $1,000 or imprisonment for not more than five years, or both.
>
> (d) Assualt by striking, beating, or wounding, by fine of not more than $500 or imprisonment for not more than six months, or both.
>
> (e) Simple assault, by fine of not more than $300 or imprisonment for not more than three months, or both. 18 U.S.C. 113.

v. Stewart, 568 F.2d 501, 504-505 (6th Cir. 1978). *See also United States v. Anderson*, 425 F.2d 330, 333 (7th Cir. 1970); *United States v. Lowery*, 306 F.2d 133, 135 (4th Cir. 1961).

We find, therefore, that the elements of the criminal charge of assault by striking, beating, or wounding are substantially identical to the agency's charge of shoving and striking, where the same incident was involved. Since the charge was fully litigated in the criminal proceeding and since its determination was essential to the resulting judgment of guilty, we conclude that the threshold requirements for the application of the collateral estoppel doctrine have been met in this case.

The appellant has asserted that it would be "grossly unfair" to estop him from denying misconduct for which he was criminally convicted because there is no indication in the record as to what evidence was presented in the prior proceeding. By the very nature of the charge and the conviction, however, some evidence must have been introduced to establish beyond a reasonable doubt that the misconduct did occur. *See Emich Motors Corp., supra*, at 569. The conviction should, therefore, estop the appellant from denying the misconduct charged by the agency, absent a showing that the appellant was denied the opportunity to defend himself fully and fairly. *See Blonder-Tongue Laboratories, Inc., supra*, at 333.

During the hearing before the presiding official, the appellant's attorney and the agency representative discussed with the presiding official the effect to be given the evidence of the appellant's criminal convictions. Hearing Transcript at 39-40. At that time, the appellant's attorney raised no challenge to the fairness of the convictions, questioning only their relevance before this independent tribunal. Hearing Transcript at 40. The Judgment and Probation/Commitment Orders introduced at the hearing show that the appellant was represented by his own attorney and pleaded innocent. A full and fair defense is thus assumed, since there was no showing to the contrary.

V. CONCLUSION

The Board finds, therefore, that the presiding official's failure to accord collateral estoppel effect to the appellant's prior criminal conviction was in error. His failure even to acknowledge the issue in the initial decision contravened the Board's regulations at 5 C.F.R. 1201.111(b)(1).

Upon full review of the record on appeal, we conclude that the agency's charge that the appellant shoved and struck another employee, while both were on duty, is supported by the preponderance of the evidence. We conclude, further, that the agency's dismissal of the appellant based on that charge promotes the efficiency of the service under the circumstances of this case. *Cf. Mosher Steel, supra,* at 441.

Accordingly, the initial decision dated November 30, 1979, is hereby REVERSED.

This is the final decision of the Merit Systems Protection Board. The appellant is advised of his right to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision by the Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOHN H. DICKERSON
v.
GOVERNMENT OF THE
DISTRICT OF COLUMBIA

Docket No.
DC075209010

OPINION AND ORDER

Appellant received notice proposing his removal from the District of Columbia Government after January 10, 1979, for reasons of (1) insubordination, (2) falsification of court records, and (3) failure to complete work as assigned (incompetence). He appealed to the Washington, D.C., Field Office. The presiding official determined that the removal was covered by 5 U.S.C. 7512, and that appellant was entitled, under 5 U.S.C. 7511(a)(1), to appeal to the Merit Systems Protection Board.

A hearing was requested by appellant's counsel and was scheduled for August 22, 1979, with notices to the parties on July 30, 1979. The request for postponement of the hearing which was submitted by appellant's counsel was granted, and the hearing was rescheduled for September 7, 1979. The agency subsequently requested a postponement, and the hearing was rescheduled for September 14, 1979, a date to which appellant's counsel initially expressed no objection. On September 10, 1979, however, appellant's representative filed a motion for further postponement of the hearing on the basis that he was scheduled to appear in court on September 14. The presiding official denied the motion for postponement on the basis that a commitment made with knowledge that it conflicted with the hearing in this case did not establish good cause for postponement.

Appellant's counsel appeared at the hearing, asked for reconsideration of the motion for postponement, but offered no new information in support of the motion. The presiding official again denied the motion, and counsel then made a motion that the official disqualify herself under section 1201.42 of the Board's regulations. The presiding official denied the motion for disqualification and counsel then requested certification of the issue to the Board as an interlocutory appeal under section 1201.91 of the Board's regulations. Certification was denied and the presiding official ruled that the hearing would proceed; thereupon, appellant's counsel refused to proceed and he and appellant left the room.

On October 3, 1979, the agency filed a motion to dismiss the appeal for failure to prosecute, or to adjudicate the case on the record. By notice dated October 10, 1979, the official denied the motion to dismiss the appeal and advised the parties that the record would be closed on October 23, 1979. No further submissions were received and the appeal was adjudicated on the basis of the written record.

The presiding official dismissed one specification under the charge of insubordination, sustained five others, and sustained the charge. With regard to the charge of falsification of court records, the presiding official sustained all three specifications and the charge. The charge of failure to complete work as assigned (incompetence) was not sustained. On the basis of all sustained specifications and charges, the presiding official found that the appellant's removal was warranted and was taken for such cause as would promote the efficiency of the service.

Appellant's petition for review, submitted through counsel, stated:

> 1. On September 14, 1979, the undersigned counsel filed an Interlocutory Appeal pursuant to 1201.42(b) (c) of the Merit Systems Protection Board Rules, requesting disqualification of the presiding official based on bias, prejudice and failure to use fair consideration (Exhibit A)
>
> 2. Thereafter, on November 14, 1979, the undersigned counsel filed a Motion to Supplement the Appeal, (Exhibit B);
>
> 3. For the reasons contained in Exhibit A and B, (appellant) was unable to receive fair consideration, and due process to which he is guaranteed by the Constitution of the United States;
>
> 4. Wherefore, it is requested that the decision of the presiding official be set aside, and that the matter be certified to another presiding official, that a new hearing date be set, and that my client be afforded his right to cross-examine his accusers.

The issues in the instant case are: 1) Whether the Merit Systems Protection Board has appellate jurisdiction in this case despite the fact that appellant is an employee of the District of Columbia; and 2) Whether, if it has jurisdiction, the matter should be certified to another presiding official in light of the allegations presented by appellant's counsel. (The first issue was not raised by either party, but is being considered here because of the circumstances of appellant's former employment.)

We first consider the Board's authority to hear the instant case. In the case of *Drew and Sargent v. District of Columbia Government*, 2 MSPB 539 (1980), the Board held that excepted service employees of the D.C. Government have no right of appeal to the Board. 5 U.S.C. 7511(a)(1)(B) makes no mention of such employees, whereas 5 U.S.C. 7511(1), prior to the effective date of the Reform Act, defined a "preference eligible" specifically to include "an individual employed by the Government of the District of Columbia." In the present case, however, appellant occupied a position in the competitive service, as shown by the standard forms effecting his transfer to the position on June 15, 1969, and his eventual removal from it. Section 7511(a)(1)(A) of Title 5 defines "employee" as "an individual in the competive service . . ." and 5 U.S.C. 2102(a) states that the "competitive service" includes "positions in the government of the District of Columbia which are specifically included in the competitive service by statute."

Section 11-1725 of the D.C. Code provides, in part, that:

> Appointments and removals of court personnel shall not be subject to the laws, rules, and limitations applicable to District of Columbia employees, except as otherwise specified in the District of Columbia Court Reorganization Act of 1970.

Reference to the Court Reorganization Act, P.L. 91-358, Stat. 511, (July 29, 1970), shows that at section 192(b), the law provided that "Nothing in this title shall affect the status of persons in the competitive civil service on the date of enactment of this title. . . ." Inasmuch as appellant was already holding a position in the competitive service in the Juvenile Court on that date, pursuant to the Juvenile Court Act of 1938, 42 Stat. 596 (June 1, 1938), which required that employees of the Juvenile Court be appointed in accordance with the civil service laws, his competitive status remained unchanged at that time and until his removal.

In consideration of this analysis, we hold that the Board retained jurisdiction over appeals from employees in the competitive service, serving in the D.C. Government, who were removed prior to January 1, 1980, when the D.C. merit system was to be put into effect. Accordingly, we find that the Board does have jurisdiction over this appeal.

With respect to the question of whether this matter should be certified to another presiding official in light of appellant's counsel's allegations, the record of the hearing reflects that the presiding official had granted the petitioner one continuance of the case but, pursuant to the Board's policy of processing cases within 120 days, the presiding official had declined the second continuance because no satisfactory showing justifying it had been made.

The petitioner then asked for disqualification of the presiding official claiming that, in the past, she had made similar rulings denying continuance requests by the petitioner's attorney. This request was denied and the petitioner sought certification of this matter as an interlocutory appeal pursuant to 5 C.F.R. 1201.42(b), which was also denied. Following the issuance of the initial decision, counsel submitted what he entitled a "Motion to Supplement Interlocutory Appeal," a document in which he alleged that the presiding official was prejudiced and made improper rulings in the case. The allegations set forth in the motion have been considered in connection with the petition for review. However, the Board's regulations at section 1201.93(b), provide that only the presiding official, not a party, may certify an interlocutory appeal.

We note that the Board has maintained a policy of holding hearings promptly unless extraordinary circumstances have been shown. See 5 C.F.R. 1201.51. This policy was implemented by the Board in accordance with the intent of the Congress, which has expressed its concern with the administrative delays which occurred in the processing of appeals by the Board's predecessor agency. Delays such as these, it is stated in the legislative history of the Reform Act, are especially troublesome because they adversely affect, to a significant extent, employees who might be unemployed while their appeals are pending; at the least, the future course of the careers of the employees is subject to great uncertainty as long as the appeals are pending. Consequently, 5 U.S.C. 7701(k) contains, in addition to the requirement for the establishment of deadlines for processing appeals, a general directive to the Board to expedite its proceedings to the greatest extent possible. The procedures established by and pursuant to this subsection, and the section generally, should be administered consistent with this policy (S. Rep. No. 95-969, 95th Cong., 2d Sess. 61 (1978)).

In ruling on the appellant's motion for a third postponement of the hearing, the presiding official noted that the Field Office is required by the Board to process appeals within 120 days, a rule announced by the Board and generally known by appellants. In addition, as is required in any other proceeding before a judicial or administrative body, an attorney who agrees to accept a case pending before the Board must be prepared to move expeditiously toward an equitable resolution of the matter in accordance with the rules of that body, which here include adherence to the 120-day time limit. If an attorney cannot comply with the Board's rules because of other scheduling conflicts, the client would be better served by one who is able to do so. In light of the showing that the presiding official rescheduled the hearing twice and that the appellant's counsel initially raised no objection to the last date on which the hearing was scheduled, and in light of the clearly expressed intention of the Congress that appeals to the Board should be processed expeditiously, the Board finds that there has been no showing that the presiding official erred in not granting an additional postponement.

The Board also notes that in making an allegation that a presiding official is biased, the petitioner must overcome a presumption of honesty and integrity which accompanies administrative adjudicators. *Withrow v. Larkin*, 421 US 35 (1975), *Ash Grove Cement Co. v. FTC*, 577 F.2d 1368, 1376 (1978), *cert. denied*, 99 S.C. 571 (1978). Furthermore, in order to justify disqualification of a hearing officer, there must be a "substantial showing of personal bias." *Roberts v. Morton*, 549 F.2d 158, 164 (10th Cir. 1976), *cert. denied*, 434 US 834 (1977). The claim in this case is that, on a number of occasions, the presiding official has refused to grant a continuance. The fact that because a hearing officer has ruled against a party in the past is not a proper basis for a claim of personal bias. *NLRB v. Donelly Garment Co.*, 330 US 219, 236-37 (1947). See also *Marcus v. Director, Office of Workers' Compensation Program*, 548 F.2d 1044, 1051 (D.C. Cir. 1976). There has been no showing in this case that the presiding official was personally biased or that she could not or would not grant a fair hearing to the petitioner.

For these reasons, counsel's request for recertification of this case to another presiding official is not meritorious.

On the basis of the above, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or the Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 24, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

BILLY J. LINK
v.
DEPARTMENT OF NAVY
AND
DORIS E. MAYFIELD
v.
GENERAL ACCOUNTING OFFICE

Docket No. PH315H99038

Docket No. PH315H99048

OPINION AND ORDER

These cases are hereby consolidated by the Board, pursuant to 5 U.S.C. 7701(f)(1) and the Board's regulations at 5 C.F.R. 1201.36.

Both appellants resigned from their positions when faced with the knowledge that their probationary appointments were to be terminated for stated reasons of inadequate work performance. Appellant Link had been given a formal notification of the termination, while appellant Mayfield had received only informal notice. Both submitted appeals to the Philadelphia Field Office of the Board which were denied by the presiding official, who found that the fact that they had resigned in lieu of facing termination gave them no rights of appeal in addition to those given an employee whose appointment had been terminated by the agency, and that as probationary employees, appellants were not entitled by law or regulation to appeal to the Board.

In their petitions for review, appellants have alleged that the presiding official's interpretation of the applicable law and regulations conflicts with presumed Congressional intent and with Supreme Court decisions which discuss the rights of probationary employees. Appellant Link contends, specifically, that *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972), acknowledge that probationary or non-tenured employees have the right to procedural due process in dismissal situations, while appellant Mayfield has taken issue with the field office decision on the basis that it deprives probationary employees of all rights they previously had under 5 C.F.R. parts 713 and 772 and is contrary to Congressional intent in that it leaves probationary employees without a forum in which to air their allegations of reprisal for whistle-blowing.

Cases involving Federal employees who resign from their position rather than face agency removal actions have frequently come before the courts, and it has been found that a resignation which was procured by coercion may be reversed as an involuntary removal. This conclusion results from the finding that the procedures required by statute or regulation have not been followed. *Cosby v. United States*, 417 F.2d 1345 (Ct. Cl. 1969). However, in addressing the question of appellants' right to appeal, the presiding official recognized that the resignation in lieu of termination provided the appellants with no greater rights than they would have had if they had been terminated during their probationary periods. This action was consistent with administrative determinations made by the Board's predecessor, the Civil Service Commission, and also accords with *Cosby*, inasmuch as there were no procedures set by statute or regulation which the agency may have failed to follow by accepting the resignations which would have been subject to Board review. While appellants have taken issue with the presiding official's interpretation of the law, they have not presented evidence or argument to show that his reliance on 5 U.S.C. 7511(a)(1)(A) and 5 C.F.R. 315.806 was in error. Nor have they briefed the issue of the effect of the resignations on their attempts to appeal the anticipated terminations. Accordingly, the presiding official's decision was proper under the terms of Chapter 75 of Title 5, United States Code, and the regulations of the Office of Personnel Management (OPM) contained in part 315, subpart H of Title 5, Code of Federal Regulations.

Appellants contend, however, that the presiding official's reading of the statute is too narrow because it conflicts with judicially announced law or presumed Congressional intent. As noted above, appellant Link contends that his decision is in conflict with *Perry v. Sindermann, supra*, and *Board of Regents v. Roth, supra*, which provide for the protection of an employee's liberty and property interests in continued employment. It is true that these cases speak in terms of such constitutionally protected interests and extend protection to non-tenured public employees; however, such protection is given only under certain circumstances. With respect to a property interest, in the *Roth* case no such interest was found to exist where the plaintiff's terms of employment gave him no interest in re-employment at the expiration of his one year contract and where no state statute or university rule or policy created a legitimate claim to such an interest. In *Perry v. Sindermann* a question of fact existed as to whether it could be found that the university, which had employed the plaintiff on four successive one-year contracts, had a de facto tenure system which would justify his claimed property interest of entitlement to tenure and continued employment absent sufficient cause. The Court stated that:

> A person's interest in a benefit is a "property" interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. (*Supra* 408 U.S. at 601, 92 S.Ct. at 2699).

The present cases are clearly distinguishable from the situation addressed in the *Perry* case. Here, specific laws and regulations exist which foreclose the possibility of finding that appellants have a claim of entitlement to the benefit of hearing if dismissed during probation: 5 U.S.C. 7511(a)(1)(A), 5 C.F.R. 315.806, and the terms of Reorganization Plan No. 2 of 1978.

In terms of a liberty interest, *Roth* and *Perry* protect such an interest when the underlying action adversely affects the plaintiff's reputation or ability to secure future employment. In the instant cases, as noted above, neither appellant was actually removed from his/her position. However, the record reflects that the reasons on which the agency would have relied if it became necessary to terminate either employee's appointment related directly to the performance of their duties. A termination on the basis of such a reason has been held not to invoke a liberty interest. *Mazaleski v. Treusdell,* 562 F.2d 701 (D.C. Cir. 1971). *Accord: Paige v. Harris,* 584 F.2d 178 (7th Cir. 1978); *Stretten v. Wadsworth Veterans Hospital,* 537 F.2d 361 (9th Cir. 1976); *Adams v. Walker,* 492 F.2d 1003 (7th Cir. 1974). While the last case does not involve a Federal employee, and the others do not concern probationary employees, they clearly indicate the courts' consistent interpretation of this particular matter.

Further, the courts have examined the probationary employee termination systems employed by the Federal government and found it proper. Although the matter of the propriety of the system for effecting termination of probationary appointments was not directly at issue at the time, the Supreme Court in *Sampson v. Murray,* 415 U.S. 61, 94 S.Ct. 937 (1974), when reviewing the circumstances surrounding the grant of an injunction against the termination of the appointment of a probationary employee, did discuss the function of the Civil Service Commission review procedure in such cases. Applicable statutes and regulations provided a similar scope of review, except that probationers were permitted to file appeals to the Civil Service Commission if they alleged that their terminations were due to discrimination based on those factors for which jurisdiction has now been transferred to the Equal Employment Opportunity Commission by the terms of Reorganization Plan No. 1 of 1978. The Court found, 415 U.S. at 80-81, 94 S. Ct. at 948, that:

> We are dealing in this case not with a permanent Government employee, a class for which Congress has specified certain substantive and procedural protections, but with a probationary employee, a class which Congress has specifically recognized as entitled to less comprehensive procedures. Section 3321 of Title 5 of the United States Code, derived from the original Pendleton Act, requires the creation of this classification:
>
> "The President may prescribe rules, which shall provide, as nearly as conditions of good administration warrant, that there shall be a period of probation before an appointment in the competitive service becomes absolute."
>
> It is clear from other provisions in the Civil Service statutory framework that Congress expected probationary employees to have fewer procedural rights than permanent employees in the competitive service.
>
> * * *
>
> The Civil Service Regulations are consistent with these statutes. [Footnotes omitted.]

In addition, other courts have examined and approved the exclusion of probationary employees from the right of appeal. *See, e.g., Donovan v. U.S.*, 433 F.2d 522 (D.C. Cir. 1970), *cert. denied* 401 U.S. 944 (1971); *Toohey v. Nitze*, 429 F.2d 1332 (9th Cir. 1970), *cert. denied*, 400 U.S. 1022 (1971); *Jaeger v. Freeman*, 410 F.2d 528 (5th Cir. 1969). One case specifically examined the plaintiff's claim that, as a probationary employee, he had liberty and property interests in continued employment and found it without merit: *Heaphy v. U.S. Treasury Department*, 354 F. Supp. 396 (S.D.N.Y. 1973), aff'd 489 F.2d 735 (2nd Cir. 1974).

In light of these cases, appellant Link's contention that the presiding official's interpretation of the terms of 5 U.S.C. 7511 is at odds with *Roth* and *Perry* lacks merit. Moreover, a review of the legislative history of the Reform Act evidences no Congressional intent to extend to probationers the protections given tenured employees. See, e.g., H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 4 (1978), and S. Rep. No. 95-969, 95th Cong., 2d Sess. 9, 47, 48 (1978). This is so even though the constitutional interests had been brought to the attention of Congress (see the report of *Civil Service Reform Act of 1978 and Reorganization Plan No. 2 of 1978: Hearings on S.2640, S.2702, and S.2830 Before the Senate Committee on Governmental Affairs*, 95th Cong., 2d Sess. 254, 1333 (1978)) and a suggestion had been made that they be extended to probationary employees (Hearings, supra, 677, 678). In this regard, also see *Allison v. United States*, 301 F.2d 670 (Ct. Cl. 1962), and the cases cited therein, where at page 673 the court held:

> It is a firmly established principle of law that administrative interpretations of statutes, consistently followed by the agencies charged with their administration, and not expressly changed by Congress, are entitled to great weight. *Billings v. Treusdell*, 321 U.S. 542, 64 S.Ct. 737, 88 L.Ed 197; *United States v. Bergh*, 352 U.S. 40, 77 S.Ct. 106, 1 L.Ed.2d 102; *Hevenor v. United States*, 101 F. Supp. 465, 121 Ct. Cl. 77; *Luna v. United States*, 108 F. Supp. 510, 124 Ct. Cl. 52.
>
> It has also been held by this court that repeated enactment of an act that has been construed by the department charged with its enforcement, evidences congressional sanction of the construction the department has placed upon it. *Ware Knitters, Inc. v. United States*, 168 F. Supp. 208, 144 Ct. Cl. 141, 147.

Similarly, appellant Mayfield's contention that the Civil Service Reform Act cannot be used to deprive persons of rights established by judicial authority also must fail. Her allegation that she is left without a remedy and that the presiding official's interpretation of the law takes away from her rights she previously had under Civil Service regulations is without merit. In fact, as found above, appellant's constitutional rights were in no way diminished by the Civil Service Reform Act and Reorganization Plan No. 1. She retains the right to vindicate any constitutionally protected interest she may have by bringing to the attention of the Special Counsel[1] her allegation that her termination was due to a prohibited personnel practice and by filing a discrimination complaint in accordance with procedures set out by the Equal Employment Opportunity Commission at part 1613 of Title 29 of the Code of Federal Regulations. She also has the right to file a grievance within her agency. Accordingly, her right to remedy has not been abrogated. Rather, only the avenues to which she may look for relief have been changed by the Civil Service Reform Act and Reorganization Plan No. 1. While the Supreme Court has stated that the government may not deny a benefit to a person on the basis of a reason that infringes his constitutionally protected interest, *Perry v. Sindermann, supra*, 408 U.S. at 597, 92 S.Ct. at 2697, the fact that these alternate methods for examining the merits of her claim exist negates a contention that this constitutionally required protection has been abandoned for probationary employees. To comport with due process requirements, an employee who alleges reprisal for a constitutionally protected activity must have a proper forum in which to seek redress. That, because of duly promulgated laws and regulations, this forum is not the Board does not render the procedures followed here invalid.

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[1] The record indicates that appellant has already attempted to avail herself of that avenue of appeal. The outcome of that effort is not reviewable in the course of this adjudication.

In light of these factors, the appellants have failed to establish that the presiding official has erred in his interpretation of 5 U.S.C. 7511(a) (1) (A) or the OPM regulations at subpart H, part 315, 5 C.F.R.

Accordingly, the petitions for review are DENIED. This is the final decision of the Merit Systems Protection Board on these cases.

Appellants are hereby notified of their right to file a civil action in the Court of Claims or the appropriate circuit of the court of appeals within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LAWRENCE OLDHAM
v.
VETERANS ADMINISTRATION

Docket No.
DA075299010

OPINION AND ORDER

Appellant was removed for being absent without leave (AWOL). He appealed to the Board's Dallas Field Office and a hearing was held. The presiding official's initial decision affirmed the agency action.

Appellant petitioned for review, alleging that the initial decision was based upon erroneous interpretations of regulations and misapplications of established policy, and was of a precedential nature.

Specifically, appellant alleged that the presiding official had erred in ruling that the agency's listing of only one counseling letter in the advance notice of removal, rather than the two considered by the agency, was harmless error. An employee is entitled to the "specific reasons" for an agency proposed adverse action. 5 U.S.C. 7513(b). The presiding official properly found that the specific reasons for appellant's proposed removal were two instances of AWOL, both of which were listed. 5 C.F.R. 1201.56(b)(1) places the burden upon appellant to show that an agency's procedural error was harmful to him, such that its absence or cure might have caused the agency to reach a different conclusion from the one reached. The Board finds that the presiding official did not err in determining that appellant had not met his burden of proving harmful error.

Appellant further asserts that charging his tardiness to AWOL constitutes a precedential decision and denies him fair and equitable treatment. Agencies clearly have administrative discretion to excuse an unjustified absence or to charge it to AWOL. The presiding official found no evidence to support allegations that the discretionary agency decision was unreasonably or improperly made.

Appellant also asserts, in this regard, that the agency did not adequately disprove his allegations of premeditated and unequal treatment. The presiding official, having found that removal was within the authorized range of penalties for the sustained offense, properly placed the burden upon appellant to establish that the penalty, in fact, constituted unequal treatment. Appellant offered no such evidence, and his petition fails to show that the presiding official erred in finding these allegations unfounded. Therefore, the Board finds that the initial decision was not based upon an erroneous interpretation of regulations or misapplication of established policy, nor that it was of a precedential nature. Accordingly, the petition for review is hereby DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision by appellant.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALVIN PAGE
v.
FEDERAL AVIATION
ADMINISTRATION

Docket No.
DC075209055

OPINION AND ORDER

Petitioner, Alvin Page, requested the Board to review the initial decision of the presiding official of the Washington, D.C. Field Office which affirmed his discharge from the Federal Aviation Administration.

Petitioner did not appear at the appeal hearing scheduled for December 5, 1979, and the presiding official concluded that he had waived his right to a hearing. Therefore, the case was adjudicated on the basis of the written record. In the petition for review, petitioner asserted that he did not receive notice of the hearing and therefore, there was no waiver of the hearing right.

Review of the case record indicates that petitioner was not sent a notice of the scheduled hearing. The petitioner's and the agency's representatives received notice and did appear for the hearing, but there is nothing in the record to indicate that petitioner was informed by his representative of the hearing date.

Although an appellant has a statutory right to a hearing, 5 U.S.C. 7701(a)(1), the right may be waived, 5 C.F.R. 1201.24 (1979). When waiver of a hearing right is implied by an appellant's failure to appear at a scheduled hearing the reason for the nonappearance must be sufficiently clear, unequivocal and decisive in order to establish waiver. *Lynn v. Bureau of Indian Affairs*, 1 MSPB 331, 332 (1980).

The facts in this case do not establish that petitioner, by his absence, intended to relinquish the opportunity to present his case. There is no evidence that his representative informed him of the hearing date, and in the absence of clear evidence that petitioner had knowledge of the date, we conclude that he did not waive his right.

The Board will not imply waiver in this case despite the fact that appellant's representative knew of the hearing, because the Board's practice is to serve all documents and pleadings upon all parties to the proceedings, 5 C.F.R. 1201.26 and 1201.61 (1979).

Part of the reason for that practice was stated in the "Section-by-Section Analysis of Comments and Changes," published with the promulgation of the Board's final regulations on June 29, 1979. Concerning provision for service under 5 C.F.R. 1201.26 it was stated:

> One commentator suggested that service upon the representative be considered service upon appellant. The Board believes that representatives do not always immediately notify the appellant of such service and this failure can result in detriment to the appellant. To avoid this problem, the Board has determined that it will make service upon the representative and the appellant. 44 Fed. Reg. 38343 (1979).

Although the above section speaks specifically to service of pleadings, an appellant has no less right to receive notice of the hearing he has requested. In the absence of such notice, waiver will not be presumed.

Accordingly, the petition for review is GRANTED; the initial decision is VACATED; and the case is REMANDED to the presiding official for further proceedings.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD E. BERGER v. **DEPARTMENT OF COMMERCE**	Docket No. SE075299008

OPINION AND ORDER

Appellant was terminated upon the expiration of his term appointment, effective May 19, 1979, and he appealed to the Seattle Field Office. The presiding official found that no removal action separating appellant occurred. He concluded that the expiration of appellant's appointment was a condition of employment agreed to by him, and, thus, could not be regarded as an action initiated by the agency against his will. Accordingly, the appeal was found to be not within the Board's appellate jurisdiction and was dismissed.

In his petition for review of the initial decision, the appellant argued that the Merit Systems Protection Board has jurisdiction over his removal.

5 U.S.C. 7511 covers those types or classes of employees who are entitled to appeal from a removal, a suspension for more than 14 days, a reduction in grade, a reduction in pay, or a furlough of 30 days of less. 5 U.S.C. 7512. Since none of the forementioned personnel actions under 5 U.S.C. 7512 were taken, there is no right to appeal to the Board under 5 U.S.C. 7513(d).

Appellant received a term appointment not-to-exceed May 19, 1979, the date he was terminated. An employee who is serving a term appointment with a definite time limitation, such as here, may be separated at the expiration of that appointment if he is not reappointed. *Werner v. U.S.*, 590 F.2d 344 (Ct. Cl. 1978). By the express nature of the term appointment appellant had no right to continued employment with the agency after the predetermined term had run. See, e.g. *Board of Regents v. Roth*, 408 U.S. 564 (1972) and *Perry v. Sinderman*, 408 U.S. 593 (1974), both concerning nontenured teachers. Cf., also, *Arnett v. Kennedy*, 416 U.S. 134 (1974).

When the expiration date of an appointment is specified at the time the appointment is made, as a basic condition of employment, the employee's separation on the expiration date simply carries out the terms of the appointment. The expiration of the term appointment is not an adverse action, i.e., a removal initiated by the agency removing an employee from the rolls against his will. *See Werner,* supra.

The petition also alleges that appellant's performance ratings were unjust and that a within-grade salary increase was improperly denied. In our opinion, appellant is attempting to relate these actions to a decision not to make him a permanent employee, or renew his term appointment, thereby raising the entire matter to an action covered by 5 U.S.C. 7512. These matters, however, are not relevant to the instant action.

In light of the conditional character of appellant's appointment, the Board finds that the presiding official correctly interpreted and properly applied the applicable law. 5 U.S.C. Chapter 75. Therefore, we conclude that the presiding official appropriately determined that the action was not an action from which the appellant could appeal to the Board.

The regulatory criteria for review have not been met. See 5 C.F.R. 1201.115 (1979). Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board. Appellant is advised that he may file a civil action in an appropriate U.S. Court of Appeals or the Court of Claims within thirty (30) days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

THOMAS A. QUARRY
v.
GENERAL ACCOUNTING OFFICE

Docket No.
DC075299047

OPINION AND ORDER

Appellant was removed from his position of Supervisory Auditor because three letters he had written, to the President of the United States, a member of Congress, and the Justice Department, caused the agency to seriously question his judgment and therefore his ability to function in a professional capacity. The letters consisted of allegations, characterized by the agency as "unfounded," that there existed a massive conspiracy to harass appellant and do him mental and physical harm. Specifically, the letters contained numerous allegations concerning nearly everyone with whom appellant came into contact in his work; at GAO, on Capitol Hill, and the Veterans' Administration, as well as about appellant's neighbors.[1]

Prior to initiating the removal action, the agency placed appellant in a less sensitive position than he had been holding, removed his top-secret security clearance, and requested that he speak to a friend, doctor, or member of the clergy. Failing that, they requested he report for a psychiatric fitness-for-duty examination. Upon appellant's refusal to so report, the agency filed for involuntary disability retirement on his behalf. The application for disability retirement was disallowed for lack of medical evidence, because appellant had again refused to consult a psychiatrist. It was at that point that the agency commenced the removal action.

The presiding official of the Board's Washington, D.C. Field Office affirmed the agency's removal action. Appellant petitioned for review, alleging that:

(1) the presiding official erred by sustaining a charge not brought by the agency, *i.e.*, refusal to report for the psychiatric fitness-for-duty examination;

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[1] Appellant wrote that the above persons harassed him and conducted surveillance against him with a video device and possibly with microwave or laser devices having lethal biological effects; also, that they participated with appellant's wife in a "sex racket" accomplished by repeatedly drugging appellant into a stupor, at which times he was homosexually assaulted.

(2) the presiding official erred by relying upon evidence relating to appellant's letter to Senator Proxmire after having ruled such evidence irrelevant and inadmissible;

(3) the presiding official failed to require the agency to prove its charges by a preponderance of the evidence;

(4) the presiding official applied an improper standard when she found that the appellant believed his allegations to be false, and that that finding is not supported by any evidence; and,

(5) that the presiding official improperly relieved the agency of its burden of proving that appellant's removal would promote the efficiency of the service.

In response, the agency stated that:

1. the petition for review was untimely filed, and no good cause for the untimeliness had been shown;

2. appellant's refusal to take the fitness-for-duty examination, while relevant, had not been included as a basis for the adverse action;

3. the presiding official correctly held that appellant believed his accusations to be false;

4. appellant's removal was justified whether or not he believed his accusations to be false;

5. appellant's "irrational" accusations made his continued work performance impossible; and,

6. evidence concerning appellant's letter to Senator Proxmire should have been admissible and considered.

As to the issue of timeliness, we find that the initial decision was issued August 1, 1979. It was stated therein that it would become a final decision on September 5, 1979, unless a petition for review was filed with the Board within 35 calendar days after the petitioner's receipt of the decision.[2] By certified letter dated August 15, 1979, the appellant's attorney notified the Board that her office had received the decision on August 8, 1979, and that a petition for review would be filed. A detailed petition for review was personally delivered to the Board on September 11, 1979. The Board finds that the petition for review was filed in a timely manner and within the terms specified in the initial decision.

Appellant's petition raised several issues which warrant Board review under 5 C.F.R. 1201.115(b). Accordingly, the petition is GRANTED.

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[2] The direction given by the presiding official incorrectly stated the requirements of section 1201.114(b) of both the Board's interim and final regulations. The former were in effect when the appeal was filed with the field office; the latter became effective on June 29, 1979, during its pendency.

First, the record shows that the refusal to take the fitness-for-duty examination was not included as a basis for the removal action. Therefore, it was error for the presiding official to state that that "charge" was "properly included as a basis for the adverse action." 5 U.S.C. 7513(b)(1) requires that an employee receive 30 days' advance written notice of the charges against him. The fact that the notice of proposed removal referred to the refusal by way of explanatory background does not cause it to become a charge against appellant, especially in view of the agency's emphatic testimony to the contrary. (H.T., at 138-139). Therefore, we hold that the charge of refusal to take the psychiatric fitness-for-duty exam, not having been brought by the agency, is not sustained.

Next, we agree with appellant that the presiding official improperly relied on evidence which she had excluded from the hearing. Specifically, she noted a January 9, 1978 agency memorandum entitled "Letter from Mr. Thomas A. Quarry to Senator Proxmire," which indicated that the Senator's staff did not believe appellant's allegations to be true. However, the presiding official had ruled that as the letter to the Senator had not been included in the Proposal Notice, evidence concerning that letter would be excluded. (H.T., at 44-45, and 79-81). This exclusion encompassed any memorandum referencing that letter unless it "also refers to reactions to other letters that are in issue . . ." (H.T., at 131). The memo in question refers only to the reaction to the letter to Senator Proxmire, and thus it clearly was covered by the exclusion. The presiding official was not free to then "note" that memo in her initial decision. However, in view of our disposition of the case, this error is not decisionally significant.

The agency argued that evidence concerning the letter to Senator Proxmire should have been admitted as indicative of appellant's impaired judgment. (H.T., at 43-45, and agency's response to the petition). However, we find that the presiding official's exclusion of that evidence was proper, and within her authority under 5 C.F.R. 1201.41(b)(3).

The petition contains strong argument that appellant's letters were protected by the First Amendment and that therefore, the agency had been required to prove by a preponderance of the evidence that appellant's allegations had been made with malice, actual knowledge of their falsity, or reckless disregard of the truth, citing *Pickering v. Board of Education,* 391 U.S. 563 (1968). The presiding official's reliance upon *Ruderer v. United States,* 412 F.2d 1285 (Ct. Cl. 1969) was alleged to have been misplaced because the evidence in that case led the court to find that the plaintiff did not actually believe that the allegations he had made were true. Appellant contended that the evidence which the presiding official relied upon was insufficient to support a finding that appellant knew his allegations to be false.

The agency responded that sufficient circumstantial evidence supported the finding that appellant knew his allegations were false, citing his refusal to discuss the allegations with agency officials and his willingness to continue harmoniously working with supervisors and coworkers whom he had accused of vile conduct and crimes against his person.

The agency argued that the presiding official's reliance upon *Ruderer* had not been misplaced. That case held that false accusations against coworkers were knowingly or recklessly made because "no sane person could really believe them all true." (*Id.*, 412 F.2d at 1291).

The presiding official, while noting the serious unresolved question as to the appellant's capacity to make a judgment concerning the truth or falsity of his allegations at the time he made them, found that in line with *Ruderer*, the totality of the evidence indicated that appellant did not believe his allegations to be true. She concluded that

> *if* appellant had the capacity to discern the truth or falsity of his allegations, the totality of the evidence reflects that he was aware they were false. (Emphasis supplied).

We share the presiding official's doubts regarding appellant's capacity to distinguish truth from falsity. But the charge being impaired judgment rather than defamation of his employer, this appellant's actual belief in the truth of his allegations is not of critical importance. On the facts of this case, due to the extreme nature of appellant's allegations, we hold that the agency's charge could be sustained regardless of the deficiency in the record as to his mental state at the time he wrote the letters.

The letters presented the agency with a legitimate cause for concern over appellant's judgment and mental stability. Appellant was not removed for having criticized his employer; his allegations were so irrational and extreme that there was little danger of anyone believing them. Again, we find that it was a *bona fide* concern with appellant's mental state which caused the agency to take the steps it did. The charge against appellant was that he was no longer possessed of that degree of professional judgment which was required of his position. The letters were mere evidence of that lack of judgment, and did not constitute the charge itself.

Nevertheless, as the evidence concerning appellant's judgment came to the attention of the agency by means of letters which he had written to government officials about his superiors and coworkers (which were then returned to the agency by the recipients), care must be taken to assure that appellant is not deprived of any protections which the First Amendment may provide in his situation. Accordingly, we have examined the case before us in light of the balancing test required by *Pickering, supra,* in cases involving adverse actions taken against public employees because of their speech.[3] The Supreme Court held that the First Amendment requires a balancing test between the interests of the employee and the public in the speech, and the interests of the government, as an employer, in promoting the efficiency of the service it performs through its employees. *Id.,* at 566-567. Several factors were listed by the Court as weighing in the government's favor, but were not applicable in that case. They were:

> whether the statements were directed towards any person with whom appellant would normally be in contact in the course of his daily work; whether there is a question of maintaining discipline or harmony among coworkers; whether the working relationship between the employee and those who are criticized are such that personal loyalty and confidence are necessary to their proper functioning; whether the speech interfered with the regular operation of the office generally; and whether the speech impeded the employee's proper performance of his daily duties. *Id.,* at 569-572.

An examination of appellant's position indicates to us that the factors just listed weigh in favor of the government's interest in promoting the efficiency of the service in this case.

Appellant, as a GAO supervisory auditor, was required to work independently and to have frequent contact with Congressional staffs in order to compile his reports. Two of appellant's supervisors testified that they lost confidence in his work and judgment as a result of the letters (H.T., at 50-53 and 91), and one further testified:

> I did have discussion with Mr. John Walsh of the Subcommittee on Investigations of the Senate Committee on Governmental Affairs. . . . He was quite concerned that we would have someone on our staff who would make these kinds of . . . unsupported . . . allegations against officials on the Hill, against coworkers of the General Accounting Office, against staff members of House Committees . . . (H.T., at 103).

We find that an important element of appellant's position was the ability to maintain good working relationships with Congressional staff members. We agree with the agency that such a professional relationship would be impossible to maintain if appellant were to be writing irrational, extreme accusations to and about various persons on the Hill, among others. (*See* H.T., at 53).

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[3] *Pickering* has been extended beyond its facts, and its balancing test is now applicable in virtually all cases involving the freedom of speech of public employees. *See, e.g., Givhan v. Western Line Consolidated School District,* 99 S.Ct. 693 (1979); *Porter v. Califano,* 592 F.2d 770 (5th Cir., 1979).

The presiding official found that appellant was blind to the destructive effect his actions had upon the mutual trust which is so necessary among federal employees whose duties require them to work together (again citing *Ruderer, supra,* at 1292). Appellant argued that his precautions to ensure that his allegations were kept confidential avoided such a disruption. We find that although public employees' First Amendment protections have been expanded since *Ruderer,* the presiding official's reliance on that case did not lead to an erroneous result. We find that the conclusions which she reached in reliance upon *Ruderer* are basically the same ones we have reached upon applying the balancing test of *Pickering, supra.* That is, we find that GAO's interest in promoting the efficiency of the service by maintaining professional and confidential working relationships with Congressional staffs in order to prepare its GAO Reports outweighs appellant's right to make extreme allegations to government officials about nearly everyone with whom he comes into contact.

Appellant asserted that he should have been reassigned to another position rather than removed, citing *Doe v. Hampton,* 566 F.2d 265 (D.C. Cir., 1977). That case held, *inter alia,* that an agency must exercise informed discretion in determining whether reassignment or leave without pay are reasonable alternatives to removal of an employee suffering from a mental condition. The court added that the informed exercise of discretion necessarily contemplates a comprehensive and detailed report of a psychiatric examination so as to adequately inform the agency as to the scope of the medical problem. *Id.,* at 282. The record shows that such a psychiatric evaluation of appellant's mental condition has been impossible for the agency to obtain. Again, we are convinced that the agency did not wish to punish appellant. Rather, this agency made every reasonable effort to help him, with removal being the last available resort.

The presiding official correctly concluded that the preponderance of the evidence supported the agency's charge that appellant's judgment was seriously impaired, such that the agency could not have been expected to maintain confidence in his work; and, that appellant's removal was for such cause as will promote the efficiency of the service.

Accordingly, the agency's action in removing appellant is AFFIRMED.

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 25, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALAN VAN WINKLE v. VETERANS ADMINISTRATION	Docket No. DA075299012

OPINION AND ORDER

Appellant was removed from his position of Food Service Worker, effective March 30, 1979, for being absent without leave (AWOL). The charge was based upon three incidents of AWOL, of 8 hours each, in May of 1978. Appellant's past record of seven incidents of AWOL or failure to report on time, during the period of October and November 1976, November 1977, and January 1978, was also considered.

In his initial decision of July 6, 1979, the presiding official of the Board's Dallas Field Office sustained the agency's action. Appellant, by petition of July 25, 1979, requested that the Board review that decision.

5 U.S.C. 7701(e)(1) provides, in pertinent part, that the initial decision of the presiding official shall be final unless a petition for review is timely filed by one of the parties. The appeal was processed by the presiding official in accordance with the Board's interim regulations, published at 44 F.R. 3946 *et seq.* (January 19, 1979). The Board's criteria for review of initial decision were contained in section 1201.113 of those regulations.

This appellant had two hearings, due to the fact that the agency's first attempt to remove him was reversed by the Board on procedural grounds. His sole allegation in the petition for review was that a witness against him gave conflicting testimony at the two hearings. Specifically, he alleged that the witness, Mr. Jackson, had testified at one hearing that he had not instructed him to report to work on May 7, 1978, and, at the other hearing, that he had so instructed him. Appellant contends that this represents new and material evidence.

We have reviewed the two statements at issue:

From the transcript of the first hearing:

Q. . . . did you instruct him to be back on the 7th?

A. No, I didn't instruct him. I asked him if he would be back on Sunday, and he said he would try.

From the transcript of the second hearing:

Q. Did Mr. Van Winkle report for duty on May 7th, as instructed?

A. No, he didn't

The Board does not find that the alleged discrepancies between the two exchanges constitute "false testimony." The word "instructed" appeared in the question during the second hearing, and was not the witness's word. Appellant was essentially advised to report for work on May 7th, and he did not do so.

Additionally, the alleged discrepancies do not constitute new evidence within the definition given in the regulation, for the testimony was given at the hearing and so does not constitute evidence which was not available when the initial decision was issued. Any argument appellant wished to make concerning the significance of the alleged inconsistency could have been timely made to the presiding official.

Accordingly, the petition is DENIED.

The appellant is hereby notified of his right to petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review the Board's decision, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Paul N. Avansino v. **U.S. Postal Service**	Docket No. SF075299088

Opinion and Order

The U.S. Postal Service removed appellant, Paul N. Avansino, from the position of Carrier in the Rancho Cordova, California, Post Office, effective June 12, 1979, based on a determination by the agency's medical officer that appellant was unable to perform the duties of a Carrier due to a physical disability caused by a chronic condition of the right knee. Appellant filed an appeal with the San Francisco Field Office of the Merit Systems Protection Board on June 28, 1979.

In an initial decision dated September 24, 1979, the presiding official found after a hearing that appellant's right knee condition had originally developed while appellant was in the military service and had been treated surgically prior to his employment with the agency beginning on October 12, 1977. Although a pre-employment physical examination indicated that the condition should not have affected his performance of the duties of a Carrier, appellant underwent surgical procedures for that condition again in September of 1978 and January of 1979. As a result of the condition, appellant was in a non-pay or unearned annual-sick leave status from January 10, 1979, through February 22, 1979, and from March 30, 1979, until June 12, 1979, when he was removed. In April of 1979, appellant was examined by his personal physician and by the agency medical officer, both of whom diagnosed appellant as unfit for Carrier duties because of a disability of his right knee.

Appellant argued on appeal that, despite his physical disability to perform his duties as a Carrier, he should have been reassigned to another position within the agency for which he did qualify, such as that of Distribution Clerk, rather than be removed. The written statement of appellant's personal physician, attached to his petition for appeal and introduced at the hearing, indicated that appellant should not take a job involving "excessive walking" but could take a position involving "standing and lifting." At the hearing, appellant testified that he was aware that a Distribution Clerk was required to be able to lift up to 70 pounds at a time. The agency's medical officer testified, however, that since appellant's knee condition could be aggravated by prolonged walking, standing, or heavy lifting, he had recommended that appellant be reassigned to a position not involving such activities. In this connection, the agency established that appellant had been tested on May 19, 1979, for the position of Markup Clerk, Automated, but that he had been rated ineligible because of an unsatisfactory typing score.

Based on the evidence presented, the presiding official affirmed appellant's removal from the service, finding:

> (that) the agency made reasonable efforts to identify a position in which appellant could function without injury to himself and that, when those attempts proved unsuccessful, it acted within its discretion in initiating and effecting the separation of an individual who could no longer perform the duties of his position due to physical disability. Initial Decision at 3.

The initial decision notified appellant of the substantive and procedural requirements for filing a petition for review.

Appellant filed a timely petition for review "on the basis of new information regarding the decision and to correct information which was presented at the hearing." In his petition, appellant argued that the supplemental physician's statement attached to his petition supported appellant's position that he qualified for a Distribution Clerk position because he was able to lift loads weighing up to 70 pounds, as may be required of a Distribution Clerk. Appellant argued further that the copies of his time cards also attached to his petition showed that he worked at least two eight-hour days during the last few weeks of his employment and that the time cards conflicted with testimony and exhibits introduced at the hearing by the agency regarding additional, shorter time periods worked.

The agency responded to appellant's petition for review by noting that, as established at the hearing, the job description for Distribution Clerk requires that the incumbent stand for eight hours a day, sometimes lifting up to 70 pounds at a time. Because the agency's medical officer had diagnosed appellant's knee condition as chronic and recurring, also as established at the hearing, the agency argued that it properly concluded appellant could not function as a Distribution Clerk.

As specified by the presiding official in his initial decision, the Board's regulations provide at 5 C.F.R. 1201.115 that the Board may grant a petition for review when it is established that:

> (a) New and material evidence is available that, despite due diligence, was not available when the record was closed, or

(b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Since appellant's allegations in his petition for review relate only to the former criterion, the Board shall determine whether that requirement has been met.

Rule 60(b) of the Federal Rules of Civil Procedure provides, similarly, for relief from a final judgment or order by a court when a party establishes, *inter alia*, that there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." That "due diligence" requirement for newly discovered evidence may be analogized to the Board's "due diligence" requirement for new and material evidence because both relate to new evidence warranting reconsideration of an adjudicatory disposition at the first level. In construing Rule 60(b), the courts have required that the party offering the newly discovered evidence at least offer a reasonable explanation as to why the additional material or testimony could not have been supplied earlier. *See, e.g., United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc.*, 258 F.Supp. 735, 747 (D.Ore. 1966), *aff'd*, 404 F.2d 706 (9th Cir. 1968), *cert. den.*, 394 U.S. 921 (1969).

The Board's regulations provide at 5 C.F.R. 1201.57(a) that "(w)hen there is a hearing, the record shall be closed at the conclusion of the hearing." In the instant case the presiding official notified the parties of this rule shortly before concluding the hearing. Transcript at 32. The record shows further that appellant was notified more than two weeks before the hearing that the agency's medical officer was scheduled to testify regarding appellant's fitness for duty. When appellant did not then produce his own physician at the hearing to counter testimony by the agency's medical officer, he was precluded from arguing that testimony his physician could have proffered at the time of the hearing was "new and material evidence" that was not available when the record was closed.

Since the basis of appellant's appeal was that the agency should have reassigned him to a position within the agency for which he was qualified, namely, that of Distribution Clerk, it is reasonable to expect appellant to exercise "due diligence" in preparing to counter the agency's evidence that he was not physically qualified for it, by oral testimony or otherwise. If presenting appellant's physician as a witness would have been too expensive for appellant to afford, appellant could have introduced his physician's written statement at the hearing. Appellant has offered no reasonable explanation as to why such a statement could not have been supplied at that time. Thus, the written statement of appellant's physician dated October 23, 1979, relating to appellant's ability to lift up to 70 pounds, cannot be deemed "not available when the record was closed," as required of "new and material evidence" by the Board's regulations. 5 C.F.R. 1201.115.

With regard to appellant's newly acquired time cards that allegedly conflict with testimony and exhibits presented by the agency at the hearing, these too fail to meet the "new and material evidence" criterion in that they were in fact available when the record was closed. That is, if appellant had exercised "due diligence," he should have been aware of the existence of the time cards and their relevance to his case, and could have obtained copies for introduction at the hearing by filing a discovery motion before the hearing, in accordance with the Board's regulations at 5 C.F.R. 1201.73.

The Board finds, therefore, that neither evidentiary submission of appellant in connection with his petition for review meets the requirement of newly available material evidence under the regulations of the Board. Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board. Appellant is hereby advised of his statutory right under 5 U.S.C. 7703 to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty calendar days of receipt of this decision by the Board.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

In the matter of:
CHARLES B. COFFIELD
MINE SAFETY AND HEALTH
ADMINISTRATION
WHEELING, WEST VIRGINIA
AND
HONORABLE RAY MARSHALL
SECRETARY
DEPARTMENT OF LABOR
WASHINGTON, D.C., ET AL.

Docket No.
HQ120800009

OPINION AND ORDER

On September 10, 1980, Consolidation Coal Company (Consol) filed a Motion for Permissive Intervention and Request for Interim Relief (Motion) in this case, asking for permission to intervene pursuant to 5 C.F.R. sec. 1201.34 (1980) and requesting that the Board order the Mine Safety and Health Administration (MSHA) to reassign Mr. Coffield to mines other than those belonging to Consol pending the issuance of a final order in this proceeding. The Acting Special Counsel filed a response to Consol's Motion on September 12, 1980, and Consol submitted an amendment to its Motion on September 16, 1980.

The Board has reviewed the various submissions relating to the Motion against the statutory purpose of this agency as stated in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), and its legislative history, *viz.*: to "[safeguard] the effective operation of the merit principles in practice."[1] It does not appear that the interest asserted by Consol is related to this purpose, nor does it appear that the company's intervention would assist the Board in determining whether a prohibited personnel practice has been committed.[2]

The standard for deciding whether to grant motions for permissive intervention in Board cases is set forth in 5 C.F.R. sec. 1201.34(c) (1980), which provides that such motions should be granted "where the requestor will be affected directly by the outcome of the proceeding. . . ."[3] Any effect which the Board's decision in this case will have on Consol will be indirect, however, since it is MSHA, not the Board, which assigns inspectors to specific mines.

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[1] S. Rep. No. 969, 95th Cong. 2d Sess. 6, *reprinted in* 1978 U.S. Code Cong. & Ad. News 2723, 2728.

[2] *Cf. Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 616 (D.C. Cir. 1978) (Bazelon, J., concurring).

Consol's further request that the Board order MSHA to reassign Mr. Coffield to inspection of other mines pending final disposition of this proceeding is based on alleged prejudice to Consol arising from the testimony provided by Consol in support of Mr. Coffield's dismissal in the parallel proceeding in which Mr. Coffield is appealing that dismissal. However, this request rests upon the erroneous assumption that the Board has directed MSHA to assign Mr. Coffield currently to inspection of Consol's mines. The Board's stay orders have required only that "the terms and conditions of [Mr. Coffield's] . . . employment are not significantly different from those of similarly situated employees during the effective period of the stay." *See* Order of August 11, 1980; Order of April 3, 1980. Moreover, since Consol's concerns in this regard appear to arise out of the administration of the Mine Safety and Health Act, 30 U.S.C. secs. 801 *et seq.* (Supp. I 1977), those concerns would be more properly directed to MSHA, whose authority to carry out its responsibilities under the Act is in no way circumscribed by the Board's rulings on the agency's personnel matters.

Accordingly, the Motion is DENIED.

For the Board:

RUTH T. PROKOP.

September 26, 1980

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[3] This regulation applies to appellate cases on its face, but is made applicable to original jurisdiction cases under 5 C.F.R. sec. 1201.11 (1980).

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JIMMIE R. PRICE
v.
DEPARTMENT OF THE TREASURY

Docket No.
AT043209001

OPINION AND ORDER

I. BACKGROUND

This case comes before the Board on cross petitions for review. The respondent agency has filed a petition for review of the merits of the initial decision on the grounds that the presiding official's decision was based on an erroneous interpretation of the regulation in question (5 C.F.R. sec. 1201.115(b)). The National Treasury Employees Union ("NTEU") has also filed a petition for review on the grounds that the presiding official misinterpreted the Board's regulations by disqualifying NTEU from representing appellant, refusing to grant NTEU leave to intervene, and denying certification of interlocutory appeals on both of these issues.

Appellant was a criminal investigator employed by the United States Department of the Treasury, Internal Revenue Service ("IRS"). He was removed for unacceptable performance under 5 U.S.C. sec. 4303 and appealed to the Atlanta Field Office of this Board. The presiding official reversed the agency action, finding that the interim and final regulations[1] of the Office of Personnel Management ("OPM") establishing interim procedures for implementing section 4303 are invalid.

Prior to holding a hearing in appellant's case, the presiding official disqualified NTEU as appellant's representative.[2] As a criminal investigator, appellant's duties potentially included investigating other IRS employees concerning tax fraud. A large number of IRS employees are members of NTEU and are represented by the union in collective bargaining. Appellant is also a member of NTEU, and no question concerning his right to belong to the union has been raised in this case. However, appellant is barred from belonging to a bargaining unit under 5 U.S.C. sec.

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[1] 5 C.F.R. sec. 432.206 (1979); 5 C.F.R. sec. 432.205 (1980).

[2] The IRS had initially filed a motion requesting the presiding official to disqualify appellant's representative. The presiding official denied this motion as untimely under 5 C.F.R. sec. 1201.31(b), but disqualified NTEU on his own motion pursuant to section 1201.31(c).

7112(b)(6) and Executive Order No. 12171, 44 Fed. Reg. 66565 (1979).[3] The presiding official found that should NTEU be permitted to represent appellant in the instant proceeding it would compromise his loyalty to the agency and interfere with his ability to conduct diligent and vigorous investigations of other employees who belong to the union.

Following this decision, NTEU filed a motion for certification of an interlocutory appeal of this issue, which the presiding official denied. The union then filed a motion to intervene which was also denied. The union's subsequent motion for certification of this matter was similarly denied.

II. THE AGENCY PETITION FOR REVIEW

In its petition for review, the IRS argues that the OPM regulations are valid, and that, in any event, the presiding official's decision should have been deferred pending the Board's since-issued decision on the validity of the same regulations in *Wells v. Harris*, 1 MSPB 199 (1979). The presiding official below found that an action under 5 U.S.C. sec. 4303 could be maintained prior to the institution of a performance appraisal system under section 4302, but that the regulations were invalid because they permitted the establishment of critical elements and performance standards on an ad hoc basis for individuals whose performance had already been found unacceptable. Therefore, the presiding official reversed the agency action taken pursuant to those regulations. Although the Board decided in *Wells* that an action under section 4303 could only be brought under a performance appraisal system established under section 4302, the presiding official's ultimate conclusion as to the invalidity of the regulations is consistent with the Board's opinion in that case. Thus, to the extent the presiding official misinterpreted the OPM regulations in reversing the agency action, such misinterpretation caused no harm to the agency.

Accordingly, the agency petition for review is DENIED.

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[3] 5 U.S.C. sec. 7712(b)(6) states:

> A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—
>
> * * *
>
> (6) any employees engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security . . . .

Executive Order No. 12171 specifically identifies criminal investigators of the IRS as employees whose work affects national security.

III. THE NTEU PETITION FOR REVIEW

NTEU's petition for review in this case raises the following contentions:

> (1) That the presiding official erroneously disqualified appellant's representative on his own motion.
>
> (2) That the presiding official erred in finding a conflict of interest under 5 C.F.R. sec. 1201.31.
>
> (3) That the presiding official was in error in denying appellant's motion for certification of an interlocutory appeal of the disqualification on the grounds of conflict of interest.
>
> (4) That the presiding official erroneously denied NTEU's motion to intervene.
>
> (5) That the presiding official erroneously denied NTEU's motion for certification of an interlocutory appeal of the presiding official's denial of the motion for permissive intervention.[4]

Although appellant prevailed in the initial decision represented by other counsel, the question of whether appellant can be represented by NTEU is not now moot. There may be further proceedings in this case concerning attorney's fees, or the agency may choose to initiate a new adverse action against appellant under Chapter 75 of Title 5 of the United States Code. *Wells v. Harris.*

In disqualifying NTEU the presiding official relied on 5 C.F.R. sec. 1201.31(b) which provides in relevant part:

> (b) A party may choose any representative so long as the person is willing and available to serve. However, the other party or parties may challenge the representative on the grounds of conflict of interest or conflict of position. This challenge must be made by motion to the presiding official within 10 days after receipt of the notice of designation, and shall be ruled upon prior to consideration of the case on the merits.

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[4] As a preliminary matter, we find no merit in the agency's argument in opposition to the petition for review that it was not filed in a timely fashion. NTEU submitted its petition for review subsequent to the issuance of the initial decision by the presiding official. The agency asserts that because the petition for review was not filed within 35 days of any of the presiding official's decisions challenged in the petition, it is not timely under 5 C.F.R. sec. 1201.114(b). However, 5 C.F.R. sec. 1201.93(b) provides that: "If certification [of an interlocutory appeal] is denied the issue may be raised in a petition for review." In light of section 1201.92, which states "rulings of the presiding official may not be appealed *during the course of the hearing* unless the official certifies the ruling for review," (emphasis added), it is obvious that the petition for review must be filed within 35 days of the initial decision, not within 35 days of the decisions on the motions.

The presiding official found that appellant's duty to perform tax investigations of other IRS employees who are members of bargaining units represented by NTEU warranted a conclusion that NTEU was barred from representing appellant before the Board.

We cannot agree. For the reasons in *Owen Sweeney v. Department of the Treasury,* 3 MSPB 321 (1980), also decided today, we find that any conflict of interest which conceivably might result by virtue of appellant's representation by NTEU is far too speculative to justify disqualification of the union under 5 C.F.R. sec. 1201.31(b). Inasmuch as the agency has not submitted evidence sufficient to satisfy its burden under *Sweeney* of showing that there is a "reasonable likelihood" that a conflict of interest will result by virtue of this representation, we hold that NTEU may represent appellant should there be any further proceedings involving this matter.[5]

The other issues raised by NTEU's petition for review are now moot. "An appeal is considered moot if it cannot affect the matter in issue or cannot grant effectual relief." *In re Continental Mortgage Investors,* 578 F.2d 872, 877 (9th Cir. 1977); *Mills v. Green,* 159 U.S. 651 (1895). Considering the remaining issues of the petition for review individually, it is obvious that the Board cannot grant "effectual relief" concerning any of these claims.

NTEU asserts that permission to intervene should have been granted in order to give the union an opportunity to express its views on the methods by which performance standards were promulgated, and the fairness thereof. NTEU argues that this issue directly affects its other criminal investigator members as well as other members of the union who belong to a bargaining unit, and thus gives NTEU a "derivative right" to intervene under 5 C.F.R. sec. 1201.34. This point may have been well taken at the time the motion was originally made to the presiding official. However, in the interim the hearing has been held; the appellant has succeeded in obtaining reversal of the agency's action; and the Board has decided *Wells v. Harris.* Therefore, any error in the denial of the motion to intervene has proved harmless to appellant. The question of whether intervention should have been allowed is further rendered moot in that a decision by the Board on this question "cannot affect the matter in issue."

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[5] NTEU also asserts that the presiding official's power to disqualify a party's representative under 5 C.F.R. sec. 1201.31(c) is constrained by the same 10-day limit which applies to a motion by one party to disqualify the other party's representative under 5 C.F.R. sec. 1201.31(b). However, in light of our decision holding that the presiding official incorrectly disqualified NTEU on the basis of conflict of interest, it is unnecessary for us to decide whether a presiding official may disqualify a representative on his own motion after the 10-day time limit of 5 C.F.R. sec. 1201.31(b) has expired.

Finally, the presiding official denied certification of interlocutory appeals of the decisions to disqualify NTEU, and prohibiting intervention. The purpose of these interlocutory appeals was to afford NTEU an opportunity to participate in the original hearing of appellant's case. For the same reasons discussed in the context of the motion to intervene, the denial of these motions no longer "affects the matter at issue," nor can the Board "grant effectual relief." We leave for another day expressing any views on what circumstances or what issues necessitate or direct a presiding official to certify an interlocutory appeal.

Accordingly, NTEU's petition for review is GRANTED, and the order disqualifying the union from representing appellant is REVERSED.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 26, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

CONNIE M. THORNTON v. DEPARTMENT OF THE NAVY	Docket No. SE315H99006

OPINION AND ORDER

The petition dated June 11, 1979, requesting that the Board review the May 15, 1979 initial decision of the presiding official is DENIED.

Petitioner was terminated during the probationary period of her career conditional appointment with the Department of the Navy. She appealed to the Seattle Field Office of the Board alleging sex discrimination.

On appeal, the presiding official determined that the Board has jurisdiction over allegations of sex discrimination only where such allegations are made in connection with a matter otherwise appealable to the Board. He further found that, as a probationary employee, petitioner's right of appeal to the Board is limited to those instances where it is alleged that termination was based upon pre-appointment conditions, upon partisan political reasons, or upon marital status. Since petitioner failed to make any of the foregoing allegations, he denied the appeal for lack of jurisdiction. Petitioner now seeks review of that decision.

In response, the agency objected to the petition for review, contending that petitioner's termination was based on unsatisfactory performance and not on marital status, partisan politics or pre-appointment conditions.

Under 5 U.S.C. Section 7511(a), probationary employees are specifically excluded from those classes of persons entitled to appeal removal actions to the Board. Hence, petitioner, as a probationary employee, has no statutory right to appeal her termination to the Board.

The Board's statutory jurisdiction in cases involving allegations of discrimination is limited to those types of discrimnation set forth in 5 U.S.C. Section 7702, where allegations are made in connection with a matter otherwise appealable to the Board. As probationers have no statutory right of appeal to the Board, the Board has no jurisdiction over allegations by probationers of discrimination of the types specified in 5 U.S.C. Section 7702 (a)(1)(B).

The only right of a probationary employee to appeal allegations of discrimination to the Board is conferred by regulations promulgated by the Office of Personnel Management in 5 C.F.R. Section 315.806(b) (44 F.R. 48951-48952, August 21, 1979), which requires that such allegations of discrimination be based on partisan political reasons or on marital status. See also 5 C.F.R. Section 720.901(b), which prohibits the termination of a probationary employee for these reasons. No such allegations have been made by petitioner. Therefore, the Field Office was without jurisdiction to entertain the appeal, as the presiding official properly decided. Hence, the petition does not meet the criteria for review set forth in 5 C.F.R. Section 1201.115.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for review of this decision may be filed in the appropriate Circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

OWEN SWEENEY
v.
DEPARTMENT OF THE TREASURY

Docket No.
M-80-13

OPINION AND ORDER

This case came before the Board on certification of an interlocutory appeal filed by respondent agency pursuant to 5 C.F.R. sec. 1201.91-1201.93.

I. ISSUE PRESENTED

The sole issue to be decided in this appeal is whether a conflict of interest or position exists when the National Treasury Employees Union ("NTEU") represents a criminal investigator of the Internal Revenue Service ("IRS") in an adverse action proceeding before the Board.

II. BACKGROUND

On November 26, 1979, Owen Sweeney, appellant, received notice of a final agency decision to reduce him in grade from the position of Supervisory Criminal Investigator, GS-1911-14, to the position of Criminal Investigator, GS-1811-13. Appellant appealed the reduction-in-grade to the Board's Philadelphia Field Office on December 18, 1979, designating Sean Rogers of NTEU as his representative. Thereafter, on January 22, 1980, the IRS, pursuant to 5 C.F.R. sec. 1201.31(b), moved to disqualify NTEU on the grounds that such representation would create a conflict of interest or position.

The agency's claim of conflict of interest or position is premised on the fact that appellant's responsibilities as a criminal investigator, whether supervisory or not, include conducting investigations of other IRS employees for tax fraud. As a supervisor he would also be responsible for supervising the investigations performed by other criminal investigators. A large number of IRS employees are members of NTEU and are represented by the union in collective bargaining. Appellant is also a member of NTEU, but, pursuant to 5 U.S.C. sec. 7112(b)(6) and Executive Order No. 12171, 44 Fed. Reg. 66565 (1979), is barred from belonging to a bargaining unit because of his employment function as an investigator.[1] The agency has raised no questions concerning appellant's right to belong to the union, but argues that NTEU's representation of appellant in the instant proceeding would compromise his loyalty to the agency and interfere with his ability to conduct diligent and vigorous investigations of other employees who belong to the union.

The presiding official issued an order dated February 16, 1980, denying the motion to disqualify. In that order the presiding official found that there was no conflict of interest in the area of labor-management relations, and that any other possible conflict was too speculative to justify disqualification. On February 29, 1980, pursuant to 5 C.F.R. sec. 1201.93, the IRS moved to have the decision not to disqualify NTEU as appellant's representative certified for interlocutory appeal. On March 17, 1980, the presiding official granted this motion, staying the proceedings in the field pending its resolution.

III. DISCUSSION

Since this is a case of first impression before the Board, we believe it appropriate initially to review the statutory scheme providing for employee representation in appeals before the Board, and to analyze the judicial interpretation afforded general federal conflict of interest statutes.

The Civil Service Reform Act guarantees an employee the right to be represented by an attorney or other representative in an appeal before the Board. 5 U.S.C. sec. 7701(a)(2). The Board's procedural regulations expand on this statutory entitlement by providing at 5 C.F.R. sec. 1201.31(b):

> A party may choose *any* representative so long as the person is willing and able to serve. However, the other party or parties may challenge the representative on the grounds of conflict of interest or conflict of position.

(Emphasis added). Thus, the general policy underlying the statutory and regulatory intent is to allow a party wide discretion in choosing his representative in a proceeding before the Board, subject only to the proviso concerning conflict of interest or position, a term which is nowhere mentioned in the statute or its legislative history.[2]

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[1] 5 U.S.C. sec. 7112(b)(6) states:

> A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—
>
> * * *
>
> (6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security . . . .

Executive Order No. 12171 specifically identifies criminal investigators of the IRS as employees whose work affects national security.

When considering allegations of conflict of interest, we think it almost axiomatic that the burden of proof must rest on the party moving for disqualification. In *In the Matter of Robert Frazier*, 1 MSPB 159 (1979), the Board stated, "The burden of proof question has risen in various circumstances, and the generally accepted rule is that the proponent bears the burden of persuasion." *Id.* at 178 (citations omitted). We see no reason for departing from this general rule in the current case, especially in light of the clear legislative intent to accord employees wide latitude in choosing their representatives in proceedings before the Board.

The standard by which to determine whether a conflict of interest exists was considered and defined by the Supreme Court of the United States in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), where the Court construed the provisions of 18 U.S.C. sec. 434, a federal criminal conflict of interest statute prohibiting involvement by government agents in transactions in which they were financially interested.[3] The Court there held that, in order to determine whether a party has a financial interest in a transaction constituting a conflict of interest within the meaning of the statute, "[t]he question is . . . whether the likelihood that he might benefit was so great that he would be subject to the temptations which the statute seeks to avoid." 364 U.S. at 560. The Court also noted that:

> The obvious purpose of the statute is to insure honesty in the Government's business dealings by preventing federal agents who have interests adverse to those of the Government from advancing their own interests at the expense of the public welfare.

Id. at 548.

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[2] Similar limited restraints on representation existed prior to the Civil Service Reform Act of 1978. *See* former 5 C.F.R. sec. 772.307(c) (1978). No interlocutory appeal was permitted under those pre-Reform Act procedures.

[3] This section at that time read as follows:

> Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agency of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both.

18 U.S.C. sec. 434, repealed by Pub. L. No. 87-849, sec. 2, 76 Stat. 1126 (1962). (See 18 U.S.C. sec. 208 for current language).

The inclusion of the term "conflict of position" in the regulation at issue in the present case was intended to reinforce and reiterate the concept of "conflict of interest," which generally relates to statutory efforts to:

> protect the public from the corrupting influences that might be brought to bear upon government agents who are *financially* interested in the business transactions which they are conducting on behalf of the Government.

Id. at 563 (emphasis added). Thus, conflict of position was included in the regulation to ensure that a conflict of interest could be found even where no direct financial conflict is involved.

Clearly the Government has an important interest in ensuring that federal agents will not be compromised in the performance of tax investigations because of outside influences or considerations which are not consistent with the Government's interest in seeing that tax investigations are performed thoroughly and consistently. This interest is especially strong when the investigations to be performed involve the Government's own employees. Thus to determine whether a conflict of interest or position exists in the current case, we must ascertain whether the IRS has demonstrated there is a reasonable likelihood that, as a result of being represented by NTEU, appellant would be compromised in the performance of subsequent tax investigations.[4]

The crux of the IRS argument urging disqualification is that appellant would be prejudiced in performing tax fraud investigations of other IRS employees who are bargaining unit members if NTEU represents him in this proceeding. NTEU, on the other hand, asserts that the burden is on the agency to prove that a conflict of interest in fact exists. The union further argues that challenges to a representative interfere with the general rule allowing an employee broad latitude in choosing a representative, and thus must be narrowly construed. That being the case, the union submits that the agency must not be allowed to establish a per se rule that a conflict of interest exists, which would prohibit NTEU from representing any criminal investigator. The union further asserts that a conflict of interest can only exist where the appellant seeking representation by the union is involved in labor-management relations.

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[4] *Cf. Silver Chrysler Plymouth, Inc. v. Chrysler Motor Corp.*, 518 F.2d 751 (2d Cir. 1975), where the court held that an attorney was not disqualified from representing a client in a matter brought against a client of his former law firm unless the attorney had worked for the former client on substantially related matters and in a capacity that might have caused him to receive confidential information. The court refused to accept any speculative possibility of a conflict, and based its holding, requiring that a real showing of conflict be made, on the important interest in allowing one to choose the attorney of one's choice.

In seeking analogous case law, we have found extremely persuasive a series of cases decided by the National Labor Relations Board ("NLRB") permitting the inclusion of "inspectors" in bargaining units. Admittedly, unlike criminal investigators, these inspectors are not statutorily barred from belonging to a bargaining unit. However, the NLRB has construed 29 U.S.C. sec. 159 as establishing that the criterion for certifying an appropriate bargaining unit is whether the employees exhibit a community of interest.[5] The same standard is applied under the Civil Service Reform Act. 5 U.S.C. sec. 7112(a). If the NLRB finds the interests of various parts of the group either diverse or conflicting, membership in the same bargaining unit is prohibited. Thus, the same considerations that would render a bargaining unit inappropriate based on the employee's allegedly conflicting job interests would be relevant to the question of whether there is a reasonable likelihood that a conflict of interest would exist for a criminal investigator represented by the same union which represents the employees whom he or she must investigate.

The NLRB has generally certified as appropriate bargaining units that include employees who are responsible for inspecting the work of other members of the unit.[6] In *Bechtel, Inc.*, 225 N.L.R.B. 197 (1976), the NLRB ruled that inspectors working on the Trans Alaska Pipeline could belong to a bargaining unit represented by the same union that represented the employees whose work they inspected. The inspectors in *Bechtel* had the authority to shut down the project if they felt that the work was not being performed according to the specifications. The inspectors also had the authority to request removal or other discipline of employees.

In *Bechtel* the company expressly argued that the inspectors should not be allowed to be represented by the union because it would create a conflict of interest in regard to their responsibility for inspecting the work of fellow members of the union and for recommending disciplinary action against them. The NLRB rejected that argument, finding "no basis for presuming that representation of these employees [the inspectors], if they so choose, will result in an impairment of the performance of their duties." *Id.* at 198.

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[5] *See, e.g., Pacific Southwest Airlines v. N.L.R.B.*, 587 F.2d 1032 (9th Cir. 1978); *Swift & Co.*, 119 N.L.R.B. 1556 (1958).

[6] *See, e.g., American Type Founders Co.*, 173 N.L.R.B. 707 (1968); *Ryan Aeronautical Co.*, 121 N.L.R.B. 1502 (1958).

We believe that in the instant case, as in *Bechtel*, there is little if any basis in fact for presuming that the prospective work of an IRS criminal investigator will be compromised if he is represented in a Board proceeding by NTEU. In fact, the prospect is far more remote, for it is not at all certain that appellant will be called upon to investigate fellow union members. In contrast, the investigators in *Bechtel* performed investigations of fellow members of the union on a routine, ongoing basis. Furthermore, as the NLRB noted in *Bechtel*, the agency maintains sufficient control to correct the situation should any evidence of conflict ultimately materialize.[7]

The IRS vigorously asserts that the merits of its disqualification motion was controlled by *Alberio v. Hampton*, 433 F. Supp. 447 (D.P.R. 1970), where the court held that a supervisor in the Customs Service could not be represented in his adverse action proceedings by the labor organization which represented his subordinates.[8] The court found that Alberio's loyalty to the union subsequent to such representation would interfere with his implementation of management policies against bargaining unit members. In the instant case, however, the criminal investigators supervised by appellant are prohibited from inclusion in a bargaining unit pursuant to section 7112(b)(6) and Executive Order 12171, and his representation by NTEU in this proceeding could therefore not interfere with his managerial responsibilities. Therefore, *Alberio* is distinguishable on the facts and does not directly support disqualification of NTEU in the current case.

Furthermore, it is not likely that representation of appellant by NTEU would interfere with his investigatory duties. The supervisory duties of the Customs Service employee embody the very essence of labor-management relations. However, in this case, appellant's duty to investigate members of the bargaining unit is outside the context of labor relations. Thus, it is substantially less likely that his relationship with the union will prejudice him in the performance of these duties. *See also Bechtel, Inc.*

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[7] We also find it relevant that appellant is already an NTEU member. If there is potential for the kind of conflict IRS suggests, it would appear to arise out of this fact alone, and would not be significantly increased merely because he might be represented in a legal proceeding by the union of which he is a member.

[8] IRS further cites the Board to *Maynard v. Meachum*, 545 F.2d 273 (1st Cir. 1976) (*held*, criminal defendant who was in need of appointed counsel has no absolute right to the services of the attorney of his choice) and *Downing v. Le Britton*, 550 F.2d 689 (1st Cir. 1977) (*held*, University rule which specifically limits an employee's choice of a representative to a member of the University community does not violate due process). We find these cases to be neither on point nor persuasive. At a minimum they are limited to their own facts, and at a maximum they merely stand for the proposition that the right to a representative of one's choosing is not absolute in any or all proceedings. In no way can they be interpreted to address the issue of disqualification of a statutorily designated representative on the grounds of conflict of interest.

Finally, IRS has argued that the exclusion of criminal investigators from bargaining units was based in part on a conflict of interest, and thus constitutes grounds for prohibiting this representation as well. We cannot agree. It appears to us that investigators are excluded from the bargaining unit solely on national security grounds under section 7112(b)(6) and the Executive Order. It is therefore clear that appellant's exclusion from the bargaining unit is irrelevant to whether a conflict of interest exists which would prevent NTEU from a representing criminal investigators in proceedings before the Board.

We conclude that the IRS has presented no convincing evidence to satisfy its burden of proving that an actual conflict of interest exists. The remote possibility that the representation of appellant by NTEU might result in divided loyalty is far too speculative to constitute grounds for disqualification on the basis of conflict of interest or position under 5 C.F.R. sec. 1201.31(b).

Accordingly, the order of the presiding official below denying the agency's motion to disqualify appellant's representative is hereby AFFIRMED and the case is REMANDED to the Philadelphia Field Office for whatever further proceedings are required to dispose of this case.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

William L. Warfield v. General Services Administration	Docket No. PH075299065
Ralph K. Caldwell v. General Services Administration	Docket No. PH075299066

Opinion and Order

At the request of the petitioners' representative, who represents both petitioners in the above-captioned cases, the Board, pursuant to 5 U.S.C. 7701(f)(1) and 5 C.F.R. 1201.36, hereby consolidates for decision the petitions for review of William L. Warfield and Ralph K. Caldwell because their cases contain identical issues.

Each of the petitioners was changed to lower grade as a result of the reclassification of their positions by the respondent agency, the General Services Administration, Public Buildings Service, Fort Meade, Maryland. They appealed the action to the Board's Philadelphia Field Office where the presiding official dismissed their appeals as not within the jurisdiction of the Board. The basis for the dismissals of their appeals was that the petitioners, having received grade and pay retention benefits to which they were entitled under the provisions of the Civil Service Reform Act of 1978, had no right of appeal to the Board.

In the petitions for review, it is argued that the initial decisions of the presiding official were erroneous. The respondent agency furnished no response.

At the time the petitions for review were filed, the Board had not addressed the issue of the extent to which 5 U.S.C. 5366 limited rights of appeal that might otherwise be available under 5 U.S.C. 7512. That issue was fully examined by the Board in the case of *Donald L. Atwell, et al. v. Department of the Army,* 3 MSPB 8 (1980). In that case, the Board concluded that "employees who continue to be assigned to positions which are reclassified downward, and who receive the benefits of 5 U.S.C. 5362 and 5363, may not appeal to the Merit Systems Protection Board from either the reclassification of the position or the reduction in grade and/or pay which, but for the grade and pay retention provisions of the

Civil Service Reform Act, might otherwise have been appealable. Employees under such circumstances may still vindicate their statutorily granted rights through a classification appeal directed to OPM." [1]

Accordingly, the initial decisions of the presiding official do not involve an erroneous interpretation of statute or regulations, and it is hereby Ordered that the petitions for review be DENIED.

This is the final order of the Merit Systems Protection Board in these appeals. The initial decisions shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellants are hereby advised of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellants' receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 26, 1980*

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[1] An action which is the basis for grade and pay retention benefits may be appealed to the Board in one circumstance, which is not relevant to the instant appeals: where the retention benefit rights arose as a result of a reduction-in-force action taken by the agency under 5 C.F.R. Part 351. *See* 5 U.S.C. 5366(a)(2)(B).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES E. COHILL
v.
DEPARTMENT OF THE ARMY

Docket No.
BN035199004

OPINION AND ORDER

The appellant was separated by reduction in force from the position of Equipment Specialist (Automotive) which was abolished. He appealed, and the presiding official found that the agency's action was proper. The appellant petitioned for review of that decision, and renewed the same arguments that he made in his appeal and at the hearing, and indicated a desire to submit additional evidence and witnesses should another hearing be provided.

Section 1201.115 of the Board's regulations provides that the Board may grant a petition for review when the requesting party submits written argument and supporting documentation tending to meet certain criteria. 5 C.F.R. 1201.115 (1979). The instant petition cited no specific criterion and presented no argument or documentation tending to meet any criterion.

The additional witnesses and evidence would all appear to be an attempt to buttress the primary chord of appellant's contention that the competitive area was too small. From the description of the evidence, e.g. the appellant's pay voucher, and blanket travel orders, it appears that such items were available at the time the record closed. There is no showing of the expected testimony of the witnesses and its materiality or that such testimony was not available at the time the record closed. Thus, appellant failed to meet the Board's criteria for reopening on the basis of new evidence. 5 C.F.R. 1201.115(a) (1979).

In his petition, appellant appeared to be implying error by the presiding official with respect to the competitive areas established and the failure of the agency to afford him assignment rights to an Equipment Specialist position. The Board's review of the initial decision and the evidence of record, including the appellant's petition for review, discloses no error on the part of the presiding official. The competitive area was established in accord with 5 C.F.R. 351.402 (1979). Likewise, the Board finds that the initial decision properly found that the appellant was not "fully qualified" for assignment to the position in question. 5 C.F.R. 351.701 (1979).

Accordingly, in view of the failure of the appellant to demonstrate the existence of any new and material evidence which was not available, despite due diligence at the time the record closed, and finding no error in the presiding official's interpretation of statute or regulation, the petition for review is hereby DENIED.

This is a final decision of the Merit Systems Protection Board. The appellant is advised of his right to file a petition seeking judicial review of this decision in the appropriate circuit of the United States Court of Appeals or in the United States Court of Claims within thirty days of the receipt of the decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 25, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KENNETH L. BERRY
v.
VETERANS ADMINISTRATION

Docket No.
CH075299024

OPINION AND ORDER

Appellant was removed from his position with the Veterans Administration, Dayton, Ohio, and appealed to the Board's Chicago Field Office. The presiding official sustained the removal. On petition for review appellant argues that he did not get a fair hearing because the presiding official would not grant his motion for a continuance, and because the presiding official was biased against him as evidenced by his rulings on the scope of testimony at the hearing.

Appellant was employed as a Vehicle Operator. The charges on which his removal was based stem from an incident on December 25, 1978. While on a driving assignment that day he was involved in a traffic accident. The police report reflected that appellant was arrested for driving while intoxicated and was at fault in the accident. Appellant admitted his fault in the matter.

On appeal, appellant designated the American Federation of Government Employees, Local 2209, to represent him but did not identify a specific individual who would be responsible for his representation. Appellant requested a hearing, which was scheduled for June 5, 1979 by notice sent to both parties on May 8, 1979. On June 5, 1979, prior to going on the record, the appellant's representative entered an objection to proceeding with the hearing. On the record, she explained her reasons for requesting a continuance by stating:

> Mr. Berry's representative was Mr. Charles Harper, the Steward for Engineering. On May 18, Mr. Harper was selected for a management job of Supervisor of Ground Maintenance, and he assumed this responsibility on May 20, two days later.
>
> On May 22, Mr. Harper brought the folder of Mr. Berry to our office and left it along with the other materials. He came back to deliver other materials. He had attempted to take this case. At that time, I was out of the state taking care of union business.

> When I returned on the 29th, I attempted to assign Mr. Berry to another individual. The Steward he was assigned to was ill and has been off work ever since. I was not made aware of this until yesterday by Mr. Berry . . . I feel at this point that I am not familiar with even the surroundings of the incident that happened. I cannot properly represent Mr. Berry in his hearing because I have not yet had time to prepare any type of defense for him.

The presiding official ruled that the union as a whole was responsible for representing appellant in the absence of his designation of a specific union representative, and that good cause for postponing the hearing had not been shown. He did, however, ask the union representative what would be gained by a continuance and, upon her response that she needed time to go over the file with appellant, allowed approximately an hour for such review (the case file was not voluminous).

The Board's regulations provide that a motion for postponement shall be granted only upon a showing of good cause. 5 C.F.R. 1201.51 (1979). In this case, the union was aware by May 18, some 18 days prior to the hearing, that the steward on the appellant's case would not be able to continue. Due to apparent administrative oversight, the union did not take steps until June 4th to insure that someone would represent appellant at the June 5th hearing. The Board notes that despite these problems, the appellant contacted the field office on May 21, 1979, requesting the appearance of two witnesses at the hearing. This request was made in the names of the appellant and the Local 2209 president, Ms. Amey, who later represented the appellant at the hearing. The Board also notes that the agency called no witnesses at the hearing; consequently, the union representative had only to examine the two witnesses called by appellant at the hearing. Furthermore, the presiding official took an active part in questioning the witnesses when Ms. Amey appeared to have difficulty in phrasing her questions. Moreover, appellant has not alleged any specific harm that resulted from denial of the continuance. Under these circumstances, the Board finds that the appellant did not show good cause for a postponement of the hearing and that appellant was not denied an opportunity to effectively present his case at the hearing.

Appellant also alleges bias on the part of the presiding official as evidenced by his denial of the postponement and his sustaining of agency objections to some of appellant's lines of questioning at the hearing. Appellant wanted to show that the proposing official had had "negative contacts" with appellant and proposed his removal for that reason. The objection to this line of questioning was sustained. The proposing official initiated the action only after receiving the police and other reports on the December 25th incident. Regardless of his personal feelings about appellant, the proposing official had before him evidence of admitted misconduct by appellant which warranted taking the action. Further, the proposing official was just that, only a proposing official. It was the Center director who made the decision to take action and who imposed the penalty. There was no allegation of "negative contact" between the Center director and appellant, nor any evidence that the proposing official sought to bias the Center director against appellant or that the Center director did not have before him a fair and complete statement of the facts on which the charges rested. The Board finds no error in this regard. The only other area in which the presiding official did not permit questioning concerned whether the appellant or the agency paid for the damage that occurred in the accident. This line of questioning was stopped after the witness testified that he did not know the answer. The Board finds the presiding official's rulings were based on his view of the issues before him and what evidence would be relevant thereto, 5 C.F.R. 1201.41 (1979), and were not in error. The Board finds no evidence of conduct by the presiding official which was reflective of bias.

Therefore, the Board finds that the petition does not meet the criteria set forth by the Board's interim regulations, 5 C.F.R. 1201.113 (1979).

Accordingly, the Petition for Review is DENIED. This is the final decision of the Merit Systems Protection Board on this case. Appellant is hereby informed of his right to request judicial review in the U.S. Court of Appeals for the appropriate circuit or in the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Charles M. Dickinson v. Department of Energy	Docket No. AT035399001

Opinion and Order

The appellant was employed as a Security Specialist (Courier), GS-7, with the Department of Energy, Albuquerque Operations Office, Albuquerque, New Mexico. Appellant's duty station, however, was in Oak Ridge, Tennessee.

On May 5, 1978, appellant sustained a mild myocardial infarction while engaged in a one and one-half mile run directed and required by the agency as part of its physical fitness program for couriers. He was permitted to return to a duty status in June 1978, under medical restrictions of his private physician and the physician for the agency.

On January 5, 1979, appellant was removed from his position with the agency on the basis that he failed to meet the agency's standard of medical fitness for his position.

On appeal, the agency's decision was affirmed; appellant's petition for review was denied by the Office of Appeals Review of the Merit Systems Protection Board.

Appellant filed a claim with the Department of Labor, Office of Workmen's Compensation Program (hereinafter OWCP), which held that his acute myocardial infarction, sustained on May 5, 1978, was the result of his federal employment. However, on the basis of the impartial specialist evaluation dated January 30, 1979, it found that he had had an excellent recovery with no residual difficulty, and no further disability due to the myocardial infarction. Thus, OWCP held that there was no basis for continuing compensation payments after January 30, 1979.

In his written correspondence of May 21, 1979, appellant informed the agency of the determination made by OWCP (however, the agency was notified of the same directly from OWCP), and therefore requested to be restored to duty with the agency in his former position or a position of like seniority, status and pay as provided in 5 U.S.C. section 8151 (1978), and the implementing regulations in 5 C.F.R. section 353.101 *et seq.* (1979).

Responding to appellant's request for restoration, the agency in correspondence of June 6, 1979, denied the request for restoration by stating that appellant had neither "overcome" the disability pursuant to 5 U.S.C. section 8151 (1978), nor "fully recovered" as the term is defined in 5 C.F.R. section 353.102(e) (1979).

The letter further stated that a myocardial infarction was disqualifying regardless of evidence of recovery, and that fact alone would be sufficient to validate the agency's determination; moreover, that appellant's underlying coronary disease (which is undisputed) adds even greater support to the agency's position.

The letter, in conclusion, stated that the agency nevertheless reviewed current vacancies in search of a job for appellant but found no positions available for which he qualified. The agency suggested that appellant complete and submit a SF-171 which would be placed in the active employment application files.

Subsequently, the appellant, through his representative, appealed the agency's decision to the Board's Atlanta Field Office.

In the initial decision of September 21, 1979, the presiding official held that under 5 C.F.R. section 353.304(b) (1979), the appellant was entitled to be restored to another position within the agency for which he was qualified, a position that would provide him like seniority, status, and pay, or the nearest approximation thereof, to his former position of Security Specialist (Courier), GS-7.

A petition for review dated October 24, 1979, was filed by the agency, contending that the decision of the presiding official was based upon erroneous interpretation or misapplication of statute and regulations.

In support of its contention, the agency made five allegations, as follows:

1) No determination was made as to whether appellant has restoration rights under the law and regulations.

2) Appellant has not "overcome" his injury or disability.

3) The presiding official erred in stating that the agency had not put forth sufficient effort in restoring appellant to an equivalent position.

4) The agency needed appellant to complete and submit an application for employment to serve as a current expression of job interest and placement, and for informing the agency of any geographical limitations on his part.

5) The presiding official erred in finding that the agency had violated 5 C.F.R. section 353.304(b).

Appellant's response in opposition to the agency's petition for review contends that the Board's initial decision was not based upon erroneous interpretations or application of statute or regulations, and that all of the allegations in the agency's petition for review are without merit and substance; yet, even if the allegations were of merit and substance the argument by the agency would be immaterial since the petition for review was untimely filed.

Upon scrutinizing the contentions of both parties, the Board finds that the agency's petition for review was timely filed. This finding is based upon the fact that the petition which was dated October 24, 1979, was mailed by the agency in New Mexico, in a franked (non-postmarked) envelope and received by the Merit Systems Protection Board only two days after the deadline. Considering the date of receipt, the record supports a presumption that the petition was mailed before the deadline.

We hold that an unpostmarked petition for review received by the Board will be presumed, absent other evidence, to have been mailed five days prior to the date of receipt.

The Board hereby grants the petition.

The contention of the agency that no determination of appellant's entitlement to restoration rights was made by the presiding official and that appellant did not meet all the criteria to be entitled to said rights, specifically that appellant has not "overcome" the injury or disability, is the pivotal and only real issue before this Board.

5 U.S.C. section 8151 (1978) provides a mandatory right of restoration to employees who have overcome their compensable injury or disability within one year after the date of commencement of compensation or from the time compensable disability recurs.

5 U.S.C. section 8151(b) (1978) specifically gives the Office of Personnel Management (OPM) authority to prescribe regulations to effectuate the intent of that section. Because such regulations implement the statute, they have the force of law. At 5 C.F.R. section 353.302(b) (1979), OPM has provided that:

> (b) An employee who has fully recovered from an injury or disability within 1 year after the date of commencement of compensation . . . is entitled to resume his or her former position (or an equivalent one) immediately upon cessation of compensation.

Clearly, the right of restoration is well provided for in the statutory framework, as well as in the regulations.[1] This right

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[1] In addition, OPM's gloss on its regulations, set forth in the Federal Personnel Manual, chapter 353, subchapter 2-6(a), provides in part:

> (1) If an employee has fully recovered within one year after the date compensation begins (or from the time compensable disability recurs if the recurrence begins after the employee resumes regular full-time employment with the U. S. Government) the employee is entitled to resume

relates not only to return to the position previously held, but also to an equivalent position, if the employee recovers within one year of the recurrence of that same injury or disease.[2]

Yet, the agency argues that appellant has not overcome his disability or fully recovered from the same and bases that contention on the fact that appellant no longer met the Standard of Medical Fitness for couriers as promulgated by the agency.

The standard, in pertinent part, states:

> A person is considered to be physically qualified to perform courier duties if the following conditions are met: 3. Has no clinical diagnosis or history of myocardial infarction, angina pectoris, coronary insufficiency, coronary thrombosis, or any other cardiovascular disease or congenital defect of the cardiovascular system of a variety known to be accompanied by syncope, dyspnea, collapse, sudden incapacitation or congestive cardiac failure. Has blood pressure levels no greater than 140 systolic and 90 diastolic. (A person under any form of treatment for disease of the cardiovascular system or for high blood pressure is disqualified.) [3]

It is not disputed that appellant suffered a myocardial infarction which was the very reason for his separation from his former position with the agency; therefore, pursuant to the agency standard of medical fitness appellant is disqualified for the position of courier.

Yet, 5 C.F.R. section 353.304(b) (1979), clearly states that:

> An employee who, because of compensable injury or disability, is disqualified for a position to which he has restoration rights (including an equivalent position) is entitled, within 1 year of the date he began receiving compensation, to be restored to another position in the agency for which he is qualified that will provide him like seniority, status, and

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his or her former or an equivalent position. The agency is required to restore the employee unless he or she was separated because of reduction in force, for cause, or for other reasons unrelated to the injury.

[2] See: 1974 United States Code Congressional and Administrative News 5341; S. Rep. No. 93-1081, 93rd Cong., 1st Session (1974).

[3] We note, but do not deem it necessary to decide here, that the standard of medical fitness, which absolutely precludes an employee who has recovered from a prior illness from the position or courier, clearly appears to conflict with the Rehabilitation Act, 29 U.S.C. sections 701-794, P.L. 93-112, 87 Stat. 357 (1973); P.L. 93-516, 88 Stat. 1617 (1974).

The broad statutory scheme of the Act contemplates rehabilitation and serves as protection from discrimination due to handicap or disability. See: *Davis v. Bucker*, 451 F. Supp. 791 (E.D. Pa. 1978); *Duran v. City of Tampa*, 451 F. Supp. 954 (M.D. Fla. 1978); *Drennon v. Philadelphia General Hospital*, 428 F. Supp. 809 (E.D. Pa. 1977).

> pay, or the nearest approximation thereof consistent with the circumstances in his case.

Thus, the Board agrees with the presiding official's finding that the appellant is entitled to be restored to another position within the agency for which he is qualified. Additionally, the Board finds that the presiding official did not err in finding that the agency had not put forth sufficient effort in restoring appellant to a position within the agency. 5 U.S.C. section 8151(b) states in pertinent part that:

> . . . the department or agency which was the last employer shall *immediately* and *unconditionally* accord the employee . . . the right to resume his former or an equivalent position. . . . (Emphasis added.)

The provisions of 5 C.F.R. 353.302 make it plain that the agency has an *obligation* to restore an employee when the criteria have been met for restoration rights. The agency's petition fails to show error in the initial decision in finding that it had not shown by a preponderance of the evidence that it met its burden of proving that it had complied with these requirements.

The Board finds that the medical standard of the agency which impacts upon the definition of "fully recovered" in the instant case applies only with respect to the former position held by the appellant; it does not address the question of the employee's suitability for equivalent placement within the agency, and thus is not determinative on the issue of whether the appellant has restoration rights with respect to available equivalent positions for which he may be qualified.

The agency's analysis, if accepted, would categorically abolish restoration rights any time an employee could not requalify for his former position. This analysis is clearly at odds with the explicit policy of the Congress as expressed in the law as well as the regulatory provisions which contemplate restoration rights which are broader than any applicable physical disqualification provisions of an agency.

Additionally, the agency's analysis, if accepted, would clearly limit the employee's restoration rights in an illogical manner, since the standard sought to be applied does not address the question of restoration, but only addresses the question of disqualification for a specific job.

In sum, we hold that 5 C.F.R. section 353.304 and 5 U.S.C. section 8151(b)(1) outline the circumstances under which an employee, who has had a compensable injury that has been overcome, may be restored either to his former position or to an equivalent position within the agency. Both the law and regulations contemplate restoration rights (by virtue of providing for "equivalent" placement) that are broader in scope than the disqualification contingencies of the agency's standards of medical fitness.

The Board therefore finds that despite the appellant's inability, under the agency's definition, to become "fully recovered" for purposes of being entitled to be restored to his former position of courier, appellant nonetheless has restoration rights with respect to equivalent positions within the agency.

Accordingly, the Board AFFIRMS the September 21, 1979 initial decision.

This is the final decision of the Merit Systems Protection Board. The agency shall submit evidence of compliance with the initial decision to the presiding official within 10 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LARRY W. MEIER v. DEPARTMENT OF THE INTERIOR	Docket No. SE075209007

OPINION AND ORDER

This case comes before the Board on petition for review filed by the Bureau of Indian Affairs, Department of the Interior.

I. STATEMENT OF FACTS

Respondent Meier was employed as a Teacher (Social Studies), GS-1710-9, at the petitioner's Mt. Edgecumbe School, Mt. Edgecumbe, Alaska. Pursuant to notice dated February 14, 1979, he was informed of a proposal to remove him from his position for "your immoral and notoriously disgraceful conduct adversely affecting the employee/employer relationship between yourself and the Bureau of Indian Affairs." Three specifications to the charge asserted that, between October 7 and 13, 1978, he had sexual relations with a male student on three occasions.

Respondent submitted both written and oral replies to the charges. He was subsequently informed in writing that the first and second specifications to the charge were supported by the preponderance of evidence and were sustained, but that the third was not so supported, and was not sustained. Because of the finding on the first two specifications, he was removed on June 20, 1979.

Respondent submitted a timely appeal to the Seattle Field Office of the Board. He requested a hearing in connection with the case but withdrew it because the scheduled date and location of the hearing were inconvenient. The presiding official's decision was therefore based on the record and the written submissions of the parties.

After examining the evidence and the contentions advanced on appeal, the presiding official found that the agency had failed to support the charge and specifications by a preponderance of the evidence. In arriving at this decision, he found the following factors significant: the third specification, which the agency had itself found not sustained, reflected adversely on the veracity of the student in question (referred to as Student X in the decision);

the number and quality of the character references submitted in support of respondent (from teachers, students, and others) added credibility to his statements; Student X had emotional problems which began before the dates set forth in the charges and had a reason to fabricate the story which led to the charges; two statements submitted for the record demonstrated that one of the incidents could not have happened as Student X alleged; and neither the results of a polygraph test taken by the student nor the statement of a psychologist that the student, in his view, was being truthful, were entitled to "significant" weight in the assessment of veracity. The presiding official reversed the agency decision and ordered it to cancel the removal. The agency filed a timely petition for review.

II. ISSUES

The agency's petition for review argues that the initial decision contains an erroneous interpretation of law and that new evidence is available for the Board's consideration. The first argument is directed toward the presiding official's citation of the case of *Pulakis v. State of Alaska,* 476 P.2d 474 (S. Ct. of Alaska, 1970) in support of the "exclusion" of the results of the polygraph test. The agency contends that the qualifications of the polygraph examiner were a matter of record, contrary to the presiding official's finding; that although the *Pulakis* rule may be appropriate for cases involving a jury, it is not appropriate for a non-jury case such as this; and that it was error not to draw an adverse inference from respondent's decision not to take such a test himself. The agency also contends that the presiding official erred by substituting his judgment for that of management, and overstepped his authority by ordering that respondent be returned to the agency by cancellation of the removal action.

The argument concerning new evidence relates to four items in the record before the presiding official which the agency contends he failed to consider. The agency submits that the presiding official's error should now lead the Board to treat these items as new evidence. These items include the psychologist's analysis of Student X; the statement of Student X's roommate that Student X told him of the encounters with respondent; the inconsistencies in one of the statements submitted on respondent's behalf and the written statement of Student X, which the agency argues the presiding official misinterpreted in one respect.

The agency has also indicated in its petition that it was unfairly deprived of an opportunity to present its case fully when respondent withdrew his request for a hearing. It contends, as well, that the dismissal of the third specification was due to the agency's fault in charging the occurrence of the encounter on the wrong date, rather than to a lack of credibility of Student X. Finally, it contends that even if the petition for review is not granted, the Board should reopen the case on its own motion for reasons similar to those advanced in support of the petition.

In reply, Respondent refers to what he considers to be the weaknesses in the agency's case, and concludes that the agency has submitted no new evidence, but has only attacked the findings of fact made by the presiding official.

III. DISCUSSION

The agency's allegation of error in the interpretation of law is directed toward the presiding official's reliance on an Alaska court case concerning the validity of polygraph examination results. That case held that such tests lack sufficient reliability to be admitted into evidence in that jurisdiction. The presiding official correctly cited it as a factor for consideration in assessing the weight to be given the evidence. He did not decide to exclude the evidence concerning the polygraph examination, however, and we find that decision was also proper. Moreover, we find that the agency's assertion that the presiding official relied on the results of the polygraph to attack the credibility of Student X, who took the test, but then found that the results of such tests were inadmissible, represents an incorrect reading of the initial decision. The presiding official included the results of the polygraph examination (both those favorable to the student and those which were not) in his discussion of the evidence submitted by the agency, and cited the *Pulakis* case, *supra*, as authority for the proposition that in Alaska the courts have held that such tests lack sufficient reliability to be admissible as evidence. He then stated:

> Finally, there is other evidence here which is of significant probative value in determining the validity of the charges. Therefore, I do not find the appellant's failure to take the examination to be an admission of guilt, nor do I find that it raises an adverse inference in the case. At the same time, I do not find the results of Student X's test to be of significant importance in determining the truthfulness of his accusations. In short, while this evidence may be properly considered as a matter of the record, I do not find it to be determinative, or of significant probative value, in the instant case.

From this it is clear that the presiding official did not exclude the agency's polygraph evidence. Rather, he found the results of that examination unpersuasive.

The results of polygraph tests were initially rejected by the Federal courts because they lacked a basis in "well-recognized scientific principle or discovery." *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923). Generally, over the years the courts have continued to refuse to accept such results in criminal cases; see *Marks v. United States,* 260 F.2d 377 (10th Cir. 1958), *cert. denied,* 358 U.S. 929 (1959), as well as civil cases. See *Aetna Insurance Co. v. Barnett Brothers, Inc.,* 289 F.2d 30 (8th Cir. 1961).

Recently, because of the increasing sophistication and reliability of polygraph tests, many Courts of Appeals have given district judges wide discretion to admit polygraph results where a proper foundation is laid by the party seeking their admission. *E.g., United States v. McIntyre,* 582 F.2d 1221, 1226 (9th Cir. 1978); *United States v. Bursten,* 560 F.2d 779 (7th Cir. 1977); *United States v. Marshall,* 526 F.2d 1349 (9th Cir. 1975); *cert. denied,* 426 U.S. 923 (1976); *United States v. Mayes,* 512 F.2d 637 (6th Cir.), *cert. denied,* 422 U.S. 1008 (1975); *United States v. Infelice,* 506 F.2d 1358 (7th Cir.), *cert. denied* 419 U.S. 1107 (1974); *United States v. DeBetham,* 470 F.2d 1367 (9th Cir.), *cert. denied,* 412 U.S. 907 (1972).

Our consideration of these sources convinces us that the presiding official was within his authority both in considering the results of the polygraph test on the issue of Student X's veracity, and in attributing little significance to those results. Our decision is necessarily limited to the facts and circumstances present in this case, and in approving the presiding official's exercise of discretion we do not imply that taking a polygraph examination will be required under any circumstances or that the results of such a test must be accepted into evidence or accorded any specific weight in the final decision. We affirm here only this presiding official's sound exercise of judgment in the instant case.

We also find entirely proper the presiding official's refusal to draw any adverse inferences from respondent's decision not to submit to a polygraph examination. The courts have consistently held that the refusal of a person to take a polygraph test is inadmissible. See *United States v. Bando,* 244 F.2d 833 (2d Cir.), *cert. denied,* 355 U.S. 844 (1957); *Aetna Insurance Co. v. Barnett Brothers, Inc., supra.* Accordingly, this Board will not permit any adverse inferences to be drawn from an individual's refusal to submit to a polygraph examination.

In considering whether to allow polygraph examinations into evidence, and in determining the weight to be given such evidence, the presiding official should consider a number of factors. The majority of cases where results of polygraph tests have been excluded from evidence have involved attempts by parties to bolster their own testimony by test results which demonstrate truthful responses to certain questions. *E.g., United States v. Gloria,* 494 F.2d (5th Cir.), *cert. denied,* 419 U.S. 995 (1974); *United States v. Sockel,* 478 F.2d 1134 (8th Cir., 1973). The principal factors cited by the courts in denying admissibility include: (1) the possibility that a person who is in fact practicing deception might "beat the machine" and appear truthful, *United States v. Alexander,* 526 F.2d 161, 167 (8th Cir., 1975); (2) the likelihood that a jury would give significant, if not conclusive, weight to a polygrapher's opinion as to a witness' truthfulness in responding to a question bearing on an ultimate issue in a criminal case (*Id.* at 168);[1] and (3) the party's failure to lay an adequate foundation for the testimony by demonstrating the polygraph's substantial reliability and acceptance and establishing the competence of the examiner and the examination technique. *United States v. DeBatham,* 348 F. Supp. 1377, 1384 (S.D. Cal.), *aff'd* 470 F.2d 1367 (9th Cir.), *cert. denied,* 412 U.S. 907 (1972).

These factors should also be considered in determining the weight to be accorded polygraph examinations. The presiding official was therefore quite correct in giving weight to the fact that the qualifications of the examiner were not set out in the record. The evidence relied upon by the agency to establish those qualifications recites only that the examiner was a police officer and that a judge of the Superior Court of Alaska approved giving the test. These statements fall far short of the evidence necessary to qualify the examiner to give expert testimony on the results of an examination.

Absent the submission of information to qualify the examiner, the results of the test alone are of little use. As the Committee on Government Operations found, "The operator of the polygraph is generally conceded to be the most important component of the "lie-detection technique." House Comm. on Government Operations, *The Use of Polygraphs and Similar Devices by Federal Agencies,* H.R. Rep. No. 94-795, 94th Cong., 2d Sess. 32 (1976). Yet, in 1964, experts in the field concluded that not more than 20 percent of the persons who then conducted polygraph examinations were competent to do so. Inbau and Reid; *The Lie-Detector Technique: A Reliable and Valuable Investigative Aid,* 50 A.B.A.J. 470, 473 (1964).[2]

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[1] Although juries do not sit in Board proceedings, the presiding official needs also to guard against the error of giving undue weight to such testimony in drawing conclusions.

[2] More recent studies indicate that, properly used, the accuracy of the polygraph in detecting insincerity is 70% or greater. *See,* Horvath and Reid, *Reliability of Polygraph Examiner Diagnosis of Truth and Deception,* 62 J. Crim. L.C. & P.S. 276 (1971); Reid and Inbau, *Truth and Deception,* 234

The type of equipment used, the examiner's training, and his familiarity with the equipment are only a few of the most obvious factors which must be considered, but which are not included in this record. In addition to the numerous factors which may affect the reliability and validity of polygraph examinations themselves, the examiner's role in the process requires that he be skilled in performing many functions other than the technical operation of the machine, such as:

> —Conduct the pretest interview of the subject in order to put the subject in the right frame of mind for taking the test. This function includes allaying undue anxiety created by the test situation and instilling the myth of the infallibility of the polygraph machine and the polygraph technique.
>
> —Frame questions to cover precisely and simply the heart of the matters under inquiry.
>
> —Interpret polygraph results to distinguish between responses indicating deception and those probably caused by other factors.
>
> —Detect symptoms of mental instability of the subject without administering psychological screening tests.
>
> —Detect symptoms of the influence of depressant drugs without administering blood or urine tests.
>
> —Detect behavioral indications of deception during the course of the examination.
>
> —Detect other attempts to "beat the machine."

Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 American Criminal Law Review 29, 45 (1977). See also, Dennehy, *The Status of Lie Detector Tests in Labor Arbitration*, 1980 Labor Law Journal 430.

Without evidence of the examiner's qualifications and abilities in these areas, we find that the agency has failed to show that the results of Student X's polygraph test were worthy of great weight in the ultimate determination of fact.

Accordingly, we find that the presiding official's decision does not represent an erroneous interpretation of law.

We also reject the agency's attempt to treat documents in the record before the field office as "new" evidence which would lead us to reopen this case. The report of the psychologist and the statement by Student Y (erroneously referred to as "Student Z" in the petition), clearly were considered by the presiding official in reaching his decision. The other two matters (statement corroborating respondent's position and the written statement of Student

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(1966); Burkey, *Privacy, Property and the Polygraph*, 18 Lab. L.J. 80 (1967), among others.

X) were also a part of the record before the presiding official and were considered by him. Although the agency asserts these documents are new and material because they were not properly considered, it is evident that the thrust of the agency's argument is that, although considered, the presiding official gave too much weight to the corroborating statement, and too little weight to Student X's statement. We note, as to the latter, that the student's statement is subject to interpretation in two different ways, and that the presiding official interpreted it the same way as, apparently, did the investigators who took an oral statement from the student.

Such an allegation does not render the evidence new. If cognizable as criteria for review under 5 C.F.R. 1201.115 at all, the evidence would be supportive of a contention that the presiding official had made an error of law by failing to apply the proper evidentiary standard. In this regard, 5 U.S.C. § 7701(c)(1)(B) provides that an agency's decision shall be sustained if it is supported by a preponderance of the evidence. The Board's regulations, at 5 C.F.R. 1201.56(a)(ii), reference the statutory standard and define "preponderance of the evidence" as:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true.

Based on our review of the initial decision, there is no reason to doubt that the presiding official applied this standard. Further, the Board will not reconsider the factual findings made by the presiding official simply on the basis of the agency's allegation that he failed to give sufficient weight to the evidence introduced on its behalf, and gave too great credence to the evidence submitted by respondent. While we are aware that courts have frequently upheld dismissals of Federal employees on the basis of sexual conduct, see *Vigil v. Post Office Department of the United States*, 406 F.2d 921 (10th Cir., 1969), *Schlegel v. United States*, 416 F.2d 1372 (Ct. Cl. 1969), the evidence must be weighed with particular care where the charges place a "badge of infamy" on the employee. *Norton v. Macy*, 417 F.2d 1161, 1164 (D.C. Cir., 1969). Based on the record before us, we decline to reopen the case in order to again examine the evidence already thoughtfully considered by the presiding official.

With respect to the agency's contentions concerning the evidence it would have introduced had it been given the opportunity to go to hearing, we find no merit to the argument that such evidence should be considered at this stage in the proceedings. It is the employee, rather than the agency, who has the statutory right to a hearing (5 U.S.C. § 7701(a) (1)). However, the Board has provided by regulation that a presiding official may, at his or her discretion, grant an agency's request for a hearing (5 C.F.R. 1201.25(b)). The record fails to indicate that the agency made such a request. It does show, however, that the presiding official informed the agency that the hearing would not occur as scheduled, and that the record would remain open for the submission of further evidence or argument. The agency had adequate time to submit additional evidence or request a hearing, and it acted at its own peril in not doing one or the other.

We note also the agency's contention that the presiding official erred in treating a letter it wrote after the close of the record as a request to reopen the record. We find no error in this regard and note that the matter to which the agency objected (the introduction of a possible defense of reprisal by the agency) was neither discussed by the presiding official in the initial decision nor asserted by respondent in his reply to the petition for review.

Finally, the agency challenges the method by which the presiding official ordered it to effect appellant's restoration to duty. It argues that any order issued by this Board requiring an agency to cancel a personnel action is contrary to 5 U.S.C. § 302 and FPM Chapter 274, "Corrective Actions." [3] It also contends that since an order to cancel the removal action has the effect of returning an appellant to his former position, the agency will be required to remove the employee who was placed in that position upon appellant's removal. Instead, the agency submits that it should retain the right to simply reinstate appellant in lieu of cancelling the original action.

The agency's reliance on the statute and FPM is misplaced. The Board does not itself cancel the agency's improper personnel action; it orders the agency to do so. Therefore it does not interfere with the delegations of authority which may have been established within a particular agency. The Board's authority to order the agency to cancel a personnel action stems from 5 U.S.C. § 1205(a).[4] This statute gives the Board broad powers to order an agency to take any action which is necessary to give effect to a Board decision, and is in harmony with 5 U.S.C. § 302 since an order by the Board under § 1205 gives the agency head the legal authority contemplated in § 302 to take the personnel action.

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[3] 5 U.S.C. § 302 states in pertinent part that ". . . the head of an agency may delegate to subordinate officials the authority vested in him—(1) by law to take final action on matters pertaining to the employment, direction, and general administration of personnel under his agency . . ." Although the agency fails to identify that portion of FPM Chapter 274 to which it refers, we assume it is to subchapter 1-4, entitled "Restoration after Invalid Adverse Actions", which states: "The Commission instructs the agency to restore the employee to duty if it finds, on employee appeal, that the agency has not followed prescribed procedures in adverse actions . . ."

[4] 5 U.S.C. § 1205(a) states:

"(a) The Merit Systems Protection Board shall—

(1) hear, adjudicate, or provide for the hearing or adjudication of all matters within the jurisdiction of the Board under this title, § 2023 of

Since an improper or unwarranted personnel action is void *ab initio*, the Board finds that the most effective method to insure that all of the ill effects of the improper action have been undone is to render the action null and void by cancellation, and Board orders giving effect to its decisions will ordinarily require the agency to take such action. It is not sufficient to appoint the employee to another position of like pay and grade, even if the appointment is made retroactive to the date of the improper action, because that improper action still remains a part of the record which may prejudice the employee in the future. For this reason it was the practice of the former Civil Service Commission under prior law to "recommend" that agencies cancel personnel actions which were found improper upon employee appeal. 5 U.S.C. § 7701 (1967), 5 C.F.R. § 772.309.[5]

In this regard, while FPM Chapter 274, Subchapter 1-4 does use the word "restore," such restoration may take the form of several types of personnel action, and that the Commission intended restoration to occur through cancellation of the personnel action is plainly demonstrated in FPM letter 296-33, section 5b (July 16, 1976), which sets out the requirements for revisions of Standard Form 50 to correct unjustified or unwarranted personnel actions.[6]

The agency correctly points out that a cancellation order may have the effect of placing two employees in one position. It is certainly true that the agency should then take action to place one of the employees in another position. This, however, is an entirely separate personnel action, which must itself be taken in accordance with applicable law and regulation for such cause as will promote the efficiency of the service. In most cases, action by the agency should take the form of reassigning the new employee to another position. The Board can of course envision circumstances when it

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Title 38, or any other law, rule or regulation, and subject to otherwise applicable provisions of law, take final action on any such matter;
(2) order any Federal agency or employee to comply with any order or decision issued by the Board under the authority granted under paragraph (1) of this subsection and enforce compliance with any such order; . . ."

[5] These recommendations were binding on the agency.

[6] Pursuant to that issuance, an agency must purge its files of all references to the improper action, and the SF-50 cancelling the action must be so worded that it will not indicate it is issued as a result of an adverse action which was reversed by the Board. It has been superseded by FPM Supplement 296-31, Subtable 13, page v-80-31 (July 9, 1979) which sets forth similar requirements.

would promote the efficiency of the service to reassign the restored employee, but such circumstances will arise infrequently.[7] The resolution of this problem is the responsibility of agency management, however, and the Board will not ordinarily review the agency's decision.[8]

IV. CONCLUSION

As set forth above, our review of the petition submitted by the agency reflects that it failed to submit any evidence or argument which meets the criteria for review. For the same reasons, we find also that the agency has not advanced any argument which would cause the Board to reopen the case on its own motion.

Accordingly, the petition for review is hereby DENIED. The initial decision of the presiding official remains the decision of the Board, and shall become final five (5) days from the date of this opinion and order. 5 C.F.R. § 1201.113(b).

The Department of the Interior shall comply with the order of the presiding official. In doing so the agency shall:

(1) adhere to the requirements of FPM Supplement 296-31, Subtable 13 with respect to respondent's Official Personnel Folder;

(2) destroy all documents in all unofficial folders maintained by any persons within the agency that are copies of documents

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[7] Were appellant to be restored to his position in the middle of a school term, the agency may find that the disruption of the educational process attendant with replacing another teacher who has already established a good student-teacher relationship justifies assigning appellant to another position. This is plainly not the case at this time. The mere fact that cancellation of the action would require the agency to reassign the other employee is not sufficient justification.

[8] Ordinarily the Board's participation in a matter will end upon receipt of a certification of compliance with its order. In many circumstances such compliance can be effectuated merely by cancellation of the personnel action in question. However, in determining what future action should be taken with respect to appellant, the agency is cautioned that any personnel action taken in reprisal for the exercise of an appeal right is a prohibited personnel practice. 5 U.S.C. § 2302.(b)(9). Under 5 C.F.R. § 1201.181(a) an appellant may petition the Board for enforcement of any final decision. Under 5 C.F.R. §§ 1201.182 and 1201.184(a) the Board may take "all necessary action to ascertain [compliance and] . . . undertake efforts to obtain compliance." In giving effect to the purpose of these provisions the Board's power is both broad and continuing in nature. *See* S. Rep. No. 95-969, 95th Cong., 2d Sess. 29 (1978). Thus, subsequent agency action concerning a prevailing appellant, even if not constituting a matter otherwise directly appealable to the Board, may be the subject of a petition under 5 C.F.R. § 1201.181, if for example, the agency's formal cancellation of appellant's removal is a mere subterfuge while other actions are taken to avoid substantive compliance.

which have been purged from the Official Personnel Folder pursuant to FPM Supplement 293-31, Subchapter S8-4a(4);

(3) destroy all documents in all unofficial folders maintained by any persons within the agency which pertain to matters which are the subject of this appeal;

(4) submit evidence of compliance to the field office within ten (10) days of the date of this opinion and order, such evidence to include a copy of the SF 50 cancelling the removal and an affidavit from each custodian of any file or folder concerning respondent certifying compliance with subparagraphs 1, 2, and 3, above.

This is the final action of the Merit Systems Protection Board in this appeal. Respondent has the right to seek judicial review of the Board's action as specified in 5 U.S.C. § 7703. A petition for judicial review must be filed no later than thirty (30) days after respondent's receipt of this opinion and order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 26, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARVIN REGGANS
v.
U.S. POSTAL SERVICE

Docket No.
CH075299023

OPINION AND ORDER

Upon receipt of his notice of removal by the agency, appellant filed an appeal with the Board's Chicago Field Office. The presiding official dismissed the appeal without prejudice on June 18, 1979, after finding that the appeal was prematurely filed because appellant had filed a discrimination complaint within the agency on the appealable matter, the agency had not issued a decision on the complaint, and 120 days from the date of the complaint had not elapsed.

Thereupon, appellant, by counsel, filed a petition for review, contending that it was inequitable to dismiss the appeal prior to a decision by the agency, and arguing that the date on which he filed the discrimination complaint was April 7, 1979, rather than May 4, 1979, as stated in the initial decision.

The presiding official's disposition of the case was correct. When a discrimination complaint concerning an appealable matter is filed within an agency, and the complainant subsequently files an appeal with the Board before the issuance of an agency decision or the lapse of 120 days from the date of the complaint, the interim and final regulations of the Board require dismissal of that appeal. *See* 5 C.F.R. section 1201.153(a) (interim), section 1201.154(a) (final). Because such appeals are dismissed without prejudice to a new, timely filing, there is no inequity in this procedure, which serves to conserve judicial resources in the event the agency effects a resolution of the matter acceptable to the complainant within 120 days. Therefore, the petition for review is DENIED.

After a dismissal without prejudice resulting from a premature appeal such as occurred here, an appellant should promptly refile with the Board upon the issuance of an unsatisfactory agency decision or the passage of the 120-day waiting period, whichever occurs first. Had appellant done so in this case, the field office would undoubtedly have issued a decision on the merits by this date. The filing of a petition for review on the instant decision in no way precluded appellant from refiling before the field office; rather, a new appeal to the field office would have rendered moot the petition for review. The Board's regulations setting forth the 120-day waiting period are straightforward and precise, and appellant's attorney surely should have been aware of the significance of a decision which dismissed an appeal "without prejudice" to a new, timely filing.

In the instant case, appellant has failed entirely to file a new appeal, relying instead upon the petition for review. Meanwhile, the one-year period specified in 5 C.F.R. 1201.154(a)(2) has expired. Since a timely appeal has not been filed within one year of the date of the discrimination complaint, were the Board now to deny the petition for review without more, as would be appropriate under the circumstances, the effect would be to preclude appellant from any review of his case on the merits.[1] However, because appellant's timely petition for review demonstrates that appellant did not intend to abandon or waive his appeal rights, however casual his reading of the Board's procedural regulations, the Board finds good cause shown under 5 C.F.R. 1201.12 to waive the filing time limits set forth in 5 C.F.R. 1201.154(a). Accordingly, appellant is granted 20 days from his receipt of this opinion to file a new appeal with the Board's field office.

This is the final decision of the Merit Systems Protection Board on this case. The appellant is hereby notified of his right to file a civil action in the United States Court of Appeals for the appropriate circuit or the United States Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 26, 1980*

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[1] We need not determine whether the discrimination complaint was filed on April 7 or May 4, since the presiding official's decision to dismiss because 120 days had not passed was correct using either date. Also, using either date, more than one year has now elapsed.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT A. THALACKER
v.
DEPARTMENT OF AGRICULTURE

Docket No.
DE075209014

OPINION AND ORDER

The appellant filed a petition seeking review of the presiding official's initial decision which found that the appellant's removal for insubordination from his position as Teacher was supported by the preponderance of the evidence and was affirmed. We grant the petition for review in order to determine whether the presiding official erred in refusing to keep the record open for receipt and consideration of the Federal Labor Relations Authority Regional Director's unit clarification determination or in his affirming the agency's removal action.

The appellant occupied the position of Teacher, GS-1710-9 at the Boxelder Civilian Conservation Center, Nemo, South Dakota. In 1977, the teaching staff was reorganized, with each of four GS-9 teachers assigned to supervise one of the four GS-7 teachers. Following this reorganization, the appellant was assigned to evaluate the GS-7 assigned to him, and reluctantly he did so. However, he refused to perform an evaluation when requested the following year, claiming that he had insufficient training and that, because of his personal friendship with the subordinate, he could not be objective in evaluating him. Thereafter, the appellant was given a 4-day suspension for insubordination in relation to the refusal to perform the evaluation and he filed a grievance under the agency grievance procedure. (The grievance was denied and the appellant requested the appointment of a grievance examiner.) Following the filing of the grievance, the appellant was allowed to attend a two-day supervisory training course which included one hour on evaluation. About a week after attending this course, the appellant was again instructed to evaluate the subordinate, but, responding that he wanted an answer to his grievance, he refused. Subsequently, the appellant was given a notice of proposed adverse action and the agency issued its decision removing the appellant for insubordination.

The appellant appealed the agency's decision to the Denver Field Office, and following a hearing, the presiding official issued his initial decision.

Noting the supervisory duties contained in the appellant's job description, that other GS-9 teachers evaluated their subordinates and that the agency's order was based upon statutory and regulatory requirements that performance evaluations be accomplished on an annual basis, the presiding official rejected the appellant's contention that he was not a supervisor and that the agency should not have ordered him to evaluate the GS-7 teacher. With respect to the appellant's argument that his conversion to a supervisory position was a sham designed to preclude him, a former local union president, from engaging in union activities, the presiding official noted that the conversion took place over two years before his removal and no evidence was presented to show that he either grieved or filed an unfair labor practice over the action. Accordingly, the presiding official concluded that this argument was not relevant to the issue of the appellant's failure to obey a proper order.

Next, the presiding official rejected the appellant's argument that he was unfamiliar with the evaluation process, noting that the appellant had performed an evaluation of the same employee in 1977 and received requested training.

Finding no authority for either contention, the presiding official rejected the appellant's arguments that he should not have been asked to evaluate a personal friend and that he should not have been removed while his grievance relating to the suspension action was pending. As to the latter argument, the presiding official noted that no evidence was presented to show that the four-day suspension for the first action was ever overturned and therefore he found that the agency properly considered the February, 1979 refusal to perform the evaluation as a second act of insubordination.

Finally, as to the appellant's allegation that the penalty of removal was too harsh, the presiding official noted that removal was an appropriate penalty under the agency's table of penalties for a second offense of insubordination,[1] and that his removal was effected for such cause as will promote the efficiency of service.

Therefore, finding that the agency had proven its charge of insubordination by a preponderance of the evidence and that there was no basis for mitigating the penalty of removal, the presiding official affirmed the agency action.

In his petition for review, the appellant asserts that the presiding official erred in failing to find relevant the Report and Findings on Petition for Clarification of Unit Case No. 7-CU-4, issued by the Federal Labor Relations Authority (FLRA) Regional Director on October 19, 1979, but not received by the appellant until after the close of hearing in the instant case. The presiding official refused to keep the record open to receive the FLRA determination, finding that it was not relevant to the matter before the Board. The appellant notes that the FLRA determination concluded that the GS-9 teachers, including the appellant, were not supervisors within the meaning of section 7103 (a) (10) of the Civil Service Reform Act of 1978, and should be included in the unit of exclusive recognition. The appellant argues:

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[1] The agency's table of penalties provides for a penalty range from suspension for two pay periods to removal for a second act of insubordination (refusal to comply with instructions).

> If the report and findings of the Federal Labor Relations Authority are considered instead of being excluded it follows logically that either the case in question should have been the subject of arbitration, as called for by the Union contract, or in the alternative the findings should be dispositive of the issue since Mr. Thalacker was fired for failure to perform duties which he was under no obligation to perform in the first place.

In its response the agency maintains that the presiding official issued a proper decision, and that the petition merely repeats the argument made at the hearing, and rejected by the presiding official, that appellant's supervisory status was relevant. The agency argues that the issue before the Board involved the appellant's refusal to comply with proper instructions.

As noted above, the presiding official refused to keep the record open to receive the FLRA Regional Director's report, finding that the FLRA bargaining unit determination was immaterial to the Board's adjudication of this case. The FLRA Regional Director found "that the GS-09 teachers in question (including the appellant) do not exercise supervisory authority which is more than routine in nature or which requires the 'consistent exercise of independent judgment' contemplated by section 7103(a) (10) of the Statute." He then concluded that these employees should be included in the unit of exclusive recognition.

"Supervisor" is defined in 5 U.S.C. section 7103(a) (10) of the Civil Service Reform Act of 1978 (P.L. 95-450) as follows:

> (10) "supervisor" means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term "supervisor" includes only those

> individuals who devote a preponderance of their employment time to exercising such authority;

The definition is substantially similar to that contained in Section 2(c) of Executive Order 11491, as amended, which was superseded on January 11, 1979, by the 1978 statute. *See* Federal Labor Relations Council, *Labor-Management Relations in the Federal Service*, 8 (1975). Section 2(c) provided:

> "Supervisor" means an employee having authority, in the interest of an agency, to hire, transfer, suspend, layoff, recall promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Prior to May 1975, the definition of supervisor in the Executive Order included the words "or to evaluate their performance." However, these words were deleted by Executive Order 11838, dated February 6, 1975. The reasons for the deletion are contained in the Report and Recommendations of the Federal Labor Relations Council which accompanied the 1975 amendment to the Executive Order:

> II. SUPERVISORS
>
> 1. Definition.
>
> The definition of "supervisor" in section 2(c) should be modified to delete performance evaluation as a sole determinant of supervisory status.
>
> A variety of proposals was received to alter the definition of "supervisor" to narrow the scope of its applicability, with the assertion that its application is resulting in the exclusion from bargaining units of employees who exercise only "work leader" or equivalent responsibility. Most often these criticisms centered around the determination of supervisory status on the basis of performance evaluation where this has been assigned to employees who perform no other supervisory functions.
>
> The Council recognizes that the function of evaluating the performance of other employees may be an important part of supervisory responsibility where the evaluation is made in conjunction with one of the other supervisory functions listed in the definition. Therefore, evidence that an employee evaluates the performance of other employees can be of great assistance in the identification of supervisory positions. However, the result of the inclusion of evaluation among the

> indicia of supervisory authority has been that the possession of this authority alone is sufficient to establish that a person is a supervisor within the meaning of the Order. As a result, persons who perform an evaluation function which has only minimum effect on the employee being evaluated, but who have no other supervisory authority, may be determined to be supervisors within the meaning of the Order. The Council does not believe that such persons should be deemed supervisors. Rather, persons who evaluate the performance of other employees will not be considered supervisors unless they otherwise qualify as supervisors under the definition. This can be accomplished by deleting from the definition of "supervisor" the criterion of evaluating performance.
>
> . . .
>
> Finally, the Council considered proposals that the definition be made uniform with definitions of the term used for other purposes in the Government, such as position classification. The definition of "supervisor" in the Order reflects the special purposes which the term serves. For example, it has special significance in determining community of interest and conflict of interest in establishing appropriate units and in determining interference with the rights of employees and labor organizations in unfair labor practice proceedings. The Council concluded that any advantages to be gained through uniformity were clearly outweighed by the importance of having expert determinations made for the special purposes of the labor relations program under a definition which has been painstakingly developed over a period of time to meet those purposes.

Thus, the Reform Act, *supra,* worked no change in the definition of "supervisor;" the definition given in section 7103(a)(10) differs from that given in section 2(c) of Executive Order 11491 only in the partial exception provided in the Act for nurses and firefighters. The provision "or to evaluate their performance," having been deleted by Executive Order 11838 in 1975, was not placed back within the definition upon the enactment of the Act.

Where, as in this case, the duty of conducting a performance evaluation is within the scope of an employee's assigned position, the employee may be required to perform such duty, and it makes no difference whether he has other assigned duties indicative of supervisory authority within the statutory definition which would warrant his exclusion from the bargaining unit.

Accordingly, we find no error in the presiding official's failure to keep the record open for receipt of the unit determination finding of the FLRA Regional Director.

As to the appellant's argument that the case should have been the subject of arbitration under the union agreement, appellant initiated his appeal to the Board and is therefore estopped from denying the Board's jurisdiction which he invoked himself. Moreover, there is nothing in the record which would establish that the collective bargaining agreement contains a grievance procedure covering the adverse action in this case. Accordingly, we find no basis to conclude that the Board has no jurisdiction to decide the appeal. *See* 5 C.F.R. Section 1201.3(b) (1).

The appellant's removal was based upon his refusal to comply with the agency's order that he evaluate his subordinate teacher. This action followed a previous refusal for which he had received a 4-day suspension. The agency attempted to assist the appellant by providing him with requested training, but the appellant persisted in his refusal to carry out the agency order. Under the agency's table of penalties, removal is one of the penalties provided for a second act of insubordination.[2] Accordingly, we find no error in the presiding official's determination that the appellant's removal was effected for such cause as will promote the efficiency of the service.

The petition for review having been GRANTED, upon review, the Board AFFIRMS the initial decision of the presiding official in this case.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claim no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 26, 1980*

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[2] Having examined the agency's table of penalties, we find that the penalty of removal for a second act of insubordination was not unreasonable in this case.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RAYMOND K. BENTLEY
v.
VETERANS ADMINISTRATION

Docket No.
PH075299069

OPINION AND ORDER

Petitioner, Raymond K. Bentley, was discharged during his probationary period by the Veterans Canteen Service, Veterans Administration Hospital, respondent, for unacceptable behavior. Petitioner appealed the termination, but the appeal was dismissed by the presiding official because it was concluded that the Board did not have jurisdiction since appellant held an appointment in the excepted service and was not a preference eligible. A petition for review of the initial decision was filed by petitioner.

Petitioner has alleged that new evidence is available which warrants reopening of his case. However, he has not submitted that evidence or a description of it, and the Board therefore finds that he has failed to establish compliance with section 1201.115(a) of the Board's regulations.

Further, petitioner has made no showing that the decision of the presiding official was in error as it is clear that the record supports the presiding official's finding that the Board lacks jurisdiction over petitioner's appeal.

We note in this connection that 38 U.S.C. 4202 provides in pertinent part as follows, with respect to the duties of the Administrator of the Veterans Canteen Service:

The Administrator shall—

> (5) employ such persons as are necessary for the establishment, maintenance, and operation of the Service, and pay the salaries, wages, and expenses of all such employees from the funds of the service. Personnel necessary for the transaction of the business of the Service at canteens, warehouses, and storage depots shall be appointed, compensated from funds of the Service, and removed by the Administrator without regard to civil-service laws and the Classification Act of 1949. Such employees shall be subject to the Veterans' Preference Act of 1944, the Civil Service Retirement Act, and laws administered by the Bureau of Employees' Compensation applicable to civilian employees of the United States

Thus, under the terms of section 4202 (5), petitioner could accede to the statutory and regulatory rights of appeal provided to preference eligible employees. Petitioner as a non-preference eligible would accede to none of these rights, however, and his removal is therefore within the total control of the Administrator of the Veterans Canteen Service.

Even if petitioner were a preference eligible, he would not have been able to appeal to the Board, since 5 U.S.C. 7511 (a) (1) (B) excludes from the definition of covered employee an individual such as petitioner, who has not completed one year of current continuous service in the same or similar position.

Accordingly, the petition for review is DENIED. This is the final decision of the Merit Systems Protection Board on this case.

Petitioner is hereby notified of his right to file a civil action in the U.S. Court of Claims or in the appropriate circuit of the United States Court of Appeals within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIE BURKHALTER
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DA531E99001

OPINION AND ORDER

Appellant was reduced in grade in 1977 because he no longer met the physical requirements of his job. He received two years' salary retention pursuant to 5 U.S.C. 5337, and that two-year period expired subsequent to the enactment of the Civil Service Reform Act of 1978, Pub. L. 95-454, section 902, 92 Stat. 1223 (the Reform Act).

He appealed to the Board's Dallas Field Office, claiming that he was entitled to the pay retention benefits provided by the Reform Act. The presiding official dismissed the appeal as not within the purview of the Board's appellate jurisdiction. Both appellant and the agency have petitioned for review, urging that appellant should be afforded the pay retention benefits.

Appellant, notwithstanding his statement that "I hereby appeal the termination of my retained pay . . .," was actually asserting that he should *begin* to receive those benefits pursuant to the retroactivity provisions of section 801(b) of the Reform Act. Appellant stated, and the agency agreed, that they failed to see "where the retroactive provision for pay retention and its indefinite continuation are disallowed."

We find, however, that the cited retroactivity provision is inapplicable to the case. By its terms, section 801(b) provides retroactivity for rights of pay retention contemplated by 5 U.S.C. 5362. Appellant's claim arises under 5 C.F.R. 536.212(a) (4), but that regulation was promulgated pursuant to 5 U.S.C. 5363 and is thus not covered by the retroactivity provisions.

The presiding official found that 5 U.S.C. 5366 precluded the instant appeal to the Board. We agree, but we base our conclusion upon section 5366(b) (1) rather than upon (b) (2). Section (b) (1) provides, in pertinent part, that:

> Any action which is the basis of an individual's entitlement to benefits under this subchapter . . . shall not be treated as appealable under such appeal procedures . . .

Therefore, appellant's claim of entitlement under section 536.212 is not an appealable action.

In this case, the agency agrees that appellant should receive the pay retention provided by the Reform Act. Therefore, the agency may apply to the Office of Personnel Management (OPM) pursuant to 5 C.F.R. 536.213, which provides that OPM

> is authorized to approve, at the request of an agency, the application of grade and pay retention benefits, or any appropriate portion thereof, in such situations as that official determines appropriate and necessary.

Accordingly, the petition is GRANTED and upon review, we hereby AFFIRM the initial decision as MODIFIED by this Opinion and Order. This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

EMILY COLEMAN v. VETERANS ADMINISTRATION	Docket No. DA315H09009

OPINION AND ORDER

The petition filed with the Board on February 1, 1980, requests review of the December 31, 1979 initial decision of the presiding official affirming the agency's decision to terminate petitioner during the probationary period of her employment. That petition is hereby granted.

FACTUAL BACKGROUND

Petitioner received a career-conditional appointment to the position of licensed vocational nurse with the Veterans Administration Medical Center, Veterans Administration (hereinafter referred to as the agency), Dallas, Texas. Upon selection, she was informed that she was required to undergo a physical examination as a condition of employment. The examination was administered on March 5, 1979, and petitioner entered on duty on March 19, 1979. Later that day, the agency personnel office received the results of the examination. In the medical report, the examining physician indicated that petitioner was suffering from a back injury and recommended against the agency employing her. The agency therefore terminated petitioner the same date but, because of its failure to adhere to regulatory procedures, the termination was reversed and petitioner was reinstated on August 7, 1979.

An advance notice dated August 8, 1979, was issued to petitioner proposing to remove her for "(f)ailure to satisfy the physical examination requirements of a Licensed Vocational Nurse." Petitioner submitted a written response dated August 15, 1979, to the advance notice. The agency then issued its decision to terminate on August 23, 1979.

On appeal to the Dallas Field Office of the Board, petitioner alleged: (1) that the agency committed procedural error in employing her despite recommendation by the examining physician that she not be hired; (2) that her termination was due to discrimination based upon physical handicap; and (3) that in lieu of separating her, the agency should have placed her in another position.

The presiding official, after determining that the Board had jurisdiction under 5 C.F.R. section 315.806(c) and (d), found no violation by the agency of procedural requirements in effecting petitioner's termination for a pre-appointment condition under 5 C.F.R. section 315.805. In deciding the appeal on the merits, he determined that petitioner was not a "qualified" handicapped person within the meaning of 29 C.F.R. section 1613.702. He therefore concluded that the termination was not discriminatory. He also failed to sustain petitioner's claim that she should have been reassigned to another position, noting that her assertion was general, without specific reference to the type of work she felt she was qualified to perform.

Petitioner now seeks review of the initial decision, reiterating the allegations of procedural error and her right to reassignment.

ISSUE PRESENTED

The issue presented on review is whether the Board acquires jurisdiction under 5 C.F.R. section 315.806(c) upon petitioner's mere allegation that the agency committed procedural error by appointing her, contrary to the recommendation of the examining physician, and thereafter terminating her.

DISCUSSION

Under 5 U.S.C. section 7511(a), probationary employees are specifically excluded from those classes of persons entitled to appeal removal actions to the Board. Hence, petitioner, as a probationary employee, has no statutory right to appeal her termination to the Board.

However, a regulatory right of appeal to the Board is conferred upon a probationary employee by 5 C.F.R. section 315.806. Section 315.806(c) provides for a right of appeal where it is alleged that the agency committed procedural error under 5 C.F.R. section 315.805 in terminating the probationer for a condition arising before appointment. The specific regulatory language is as follows:

> (c) On improper procedure. A probationer whose termination is subject to section 315.805 may appeal on the ground that his termination was not effected in accordance with *the procedural requirements of that section.* (Emphasis added)

Thus, in order for the Board to acquire jurisdiction under 5 C.F.R. section 315.806(c), the appellant must allege that his termination was not effected in accordance with the procedural requirements of 5 C.F.R. section 315.805, which provides that the employee is entitled to: (a) advance written notice of the proposed adverse action and the reasons therefor; (b) a reasonable time to respond thereto and to have his response considered by the agency in making its decision; and (c) written notice of and reasons for the adverse decision at or before the effective time of the action, information pertaining to appeal rights, and time limitations involved in exercising those rights.

Petitioner has made no allegations of procedural error committed by the agency in her termination under 5 C.F.R. section 315.805. In fact the record reflects that the agency has complied with all the procedural requirements imposed by that section. Petitioner has simply alleged that, because the agency appointed her prior to receipt of the results of a physical examination upon which her appointment was conditional and which included a recommendation by the examining physician against her hiring, the agency committed procedural error in her appointment and subsequent termination. Such actions by the agency do not constitute procedural errors in termination under 5 C.F.R. section 315.805 for which petitioner is afforded a right of appeal under 5 C.F.R. section 315.806(c). Therefore, the Board was without jurisdiction to entertain the appeal. Hence, we find it unnecessary to consider the merits of the issue raised by petitioner concerning her right to reassignment and the collateral issue of discrimination based upon physical handicap.

CONCLUSION

For all of the foregoing reasons, we find that the Board was without jurisdiction to hear the appeal. Therefore, we find that the initial decision misinterprets law and regulation insofar as it asserts jurisdiction over the subject matter of the appeal.

Accordingly, the initial decision is hereby VACATED, and the appeal is hereby DISMISSED for lack of jurisdiction.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the United States Court of Appeals or the United States Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH M. GIESLER, JR.
v.
DEPARTMENT OF TRANSPORTATION

Docket No.
DE75299018

OPINION AND ORDER

Appellant received a suspension of 35 days for being absent without approved leave for four consecutive work days, and for providing false information in response to an inquiry concerning sick leave usage. In his appeal to the Denver Field Office, appellant contended, in part, that the Department of Transportation's Federal Aviation Administration, Air Route Traffic Control Center, Longmont, Colorado, committed harmful error in the application of a union agreement which provided that discipline cannot result from a meeting where the employee is not advised of the possible consequences and is not afforded the opportunity to have a union representative present. Further, appellant contended that the agency failed to follow the regulations contained in the agency's Conduct and Discipline Handbook, pertaining to informal disciplinary measures and graduated punishment, and relating to the nature of the penalty finally imposed (the agency having initially proposed removal).

After hearing the appeal, the presiding official issued his initial decision on July 19, 1979, finding that the agency's charges were supported by the preponderance of the evidence. Further, the presiding official determined that the agency attempted informal resolution concerning suspected abuse of sick leave. With regard to the penalty, the presiding official noted the agency's table of penalties, and determined that the agency did not abuse its discretion in imposing the 35-day suspension. He found that the action was taken for such cause as would promote the efficiency of the service, and sustained the agency action.

In the petition to the Board, appellant argued that the agency failed to follow its regulations with regard to the presence of a union representative at meetings for disciplinary purposes, as required by a union agreement, and with regard to the severity of the penalty. In addition, appellant asserted that he was denied meaningful discovery with regard to the precept of like penalties for like offenses.

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In its response of November 9, 1979, the agency maintained that prior to the hearing it furnished information to the appellant concerning penalties imposed in other cases for offenses similar to those committed by the appellant. In addition, the agency contended that since the union agreement is not a statute or regulation, there can be no erroneous interpretation by the presiding official, as claimed, and that the Board is not empowered by the Civil Service Reform Act of 1978. Pub. L. 95-454, 92 Stat. 1223, to interpret or modify the terms of a labor agreement.

Having reviewed the petition, and in consideration of the nature of the issues presented, the Board has decided to grant the petition and hereby reopens this case. We find that the evidence submitted with the petition meets the criteria of 5 C.F.R. 1201.115(b).

5 U.S.C. 7701(c)(2) provides that, notwithstanding that the decision of the agency is supported by the preponderance of the evidence, the agency's decision may not be sustained by the Merit Systems Protection Board if the employee shows harmful error in the application of the agency's procedures in arriving at such decision. As noted above, the appellant's contention is that the agency failed to follow its own procedural regulations contained in its Handbook and the terms of the union agreement. With regard to the union agreement, the agency's counter argument is that the contract is not a statute or regulation, and, therefore, its erroneous interpretation does not satisfy the criteria for review established by the Board at 5 C.F.R. 1201.115(b).

An agency is obligated to conform to procedures it adopts: *Vitarelli v. Seaton,* 359 U.S. 535, 79 S. Ct. (1959); Accord, *U.S. ex rel Accardi v. Shaughnessy,* 347 U.S. 260 (1954); *Service v. Dulles,* 354 U.S. 363 (1957); *Slowick v. Hampton,* 470 F.2d 467 (D.C. Cir. 1972). In this case, the Board finds that the provisions of the collective bargaining agreement represent guiding principles and established nondiscretionary policy under which the FAA operates and which have the effect of regulatory requirements in addition to those of 5 C.F.R. Part 752. The provision of the union agreement shall, therefore, be treated by the Board in the same manner as are provisions of the agency's regulations. *See, e.g., Watson v. United States,* 162 F. Supp. 755 (Ct.Cl. 1958). The Board will enforce employee rights derived from such a negotiated agreement. In his petition for review, appellant has alleged that the agency failed to fulfill its contractual obligation pursuant to the negotiated agreement with the Professional Air Traffic Controllers Organization (PATCO), which provides in Article 6, Section 1, that:

> (n)o disciplinary action may result from a meeting between an employee and his supervisor . . . unless the employee is

> advised that such meeting is for the purpose of discussing discipline or potential discipline, and the employee is allowed Union representation, if he so desires. . . .

The record reveals that appellant met with his supervisor on three occasions concerning appellant's use of sick leave and that a union representative was present at the last two meetings. The record further reveals that at the first two meetings appellant denied that he was hunting during the period he claimed he was sick, but that at the last meeting appellant admitted in the presence of his union representative that he was not sick during the days in question and that he was absent from duty.

Appellant does not contend that he requested and was denied union representation at the first meeting; the record reflects that he had the benefit of representation at the second and third meetings. Under these circumstances, we find no violation of the union agreement with regard to the right to union representation in a meeting to discuss possible abuse of sick leave by the appellant or the resolution of this problem by the agency, whether on an informal or formal basis.

With regard to appellant's allegation that he was denied the right to meaningful discovery in connection with the precept of like penalties for like offenses, he stated that he requested information on penalties imposed through an interrogatory and moved for a continuance of the hearing when the FAA did not comply with his request. Appellant concluded that he was prejudiced by being denied information that was crucial to his case, and that without discovery in this area, he was denied the right to prepare a challenge to the action taken against him. In this connection, we note that at a prehearing conference appellant was furnished information concerning disciplinary action taken by the agency against employees who committed offenses similar to those appellant was charged with having committed. Thus, appellant was not denied information relating to the right to challenge his suspension on the basis of disparate treatment. Accordingly, there is no basis to reverse the presiding official's finding on this issue.

Violations of trust necessary to the employer-employee relationship, as proven in this case, affect the efficiency of the service. It can hardly be challenged that an agency has the right to expect its employees to be truthful in all matters of official business. Moreover, an agency has a right to have employees in attendance, absent a valid excuse. The two reasons advanced for taking adverse action were sustained by the preponderance of the evidence, and we find that the agency action under the facts and circumstances of this case was for such cause as to promote the efficiency of the service.

Accordingly, upon review, the Board hereby affirms the initial decision of July 19, 1979.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is advised that he may file a civil action in an appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims within thirty 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

TIMOTHY E. GOGGINS v. DEPARTMENT OF THE ARMY	Docket No. AT531D99004

OPINION AND ORDER

The appellant, employed as a GS-11 Personnel Staffing Specialist with the U.S. Army Corp of Engineers, Ohio River Division, Nashville District, received an agency determination on March 2, 1979, that his work was not of an acceptable level of competence (ALOC). Consequently, his within-grade step increase in salary was denied. He pursued a request for reconsideration by a higher level agency official, who sustained the negative determination by a reconsideration decision issued May 18, 1979.

The appellant pursued his right of appeal to the Board's Atlanta Field Office. He claimed that the reconsideration decision was untimely and that the agency violated 5 C.F.R. 531.407(d)(4) when it failed to make available a summary of a conversation between the reconsideration official and appellant's supervisor and a memorandum from his supervisor. He also disputed the agency findings of deficiency and alleged discrimination. The presiding official reviewed the entire ALOC determination and found that the preponderance of the evidence supported the agency's findings. Regarding the discrimination claim, she found that the preponderance of evidence failed to establish the charge. Therefore, she affirmed the agency determination.

In his petition for review, appellant has essentially raised the same issues which were carefully reviewed by the presiding official. He has claimed that the presiding official erroneously interpreted statute and regulation and that he has new and material evidence. He has also stated that there are no written performance standards for his position.

Appellant has claimed that the reconsideration decision was not issued in a timely fashion. 5 C.F.R. 531.407(d)(2)(i) merely requires a "prompt decision" without specifying any time limits. The presiding official found the decision was prompt under the circumstances. Appellant had filed a discrimination complaint two days after requesting reconsideration. The official making the reconsideration asked appellant about delaying the decision until the Ad Hoc Panel convened to consider the discrimination complaint. Appellant indicated that there would be no problem. The panel issued its decision on May 14 and the reconsideration official issued his determination on May 18. Under the circumstances, the Board finds no error in the presiding official's interpretation and finding.

With regard to the summary of the conversation between the reconsideration official and appellant's supervisor and the memorandum from the supervisor, the presiding official found that this information should have been made available to appellant as required by 5 C.F.R. 531.407 (d) 4. The presiding official, however, ruled that the error was harmless because the official testified that his determination would have been the same without the summary and that appellant was provided with the information on appeal and given a full opportunity to respond. Given these facts, the Board finds no error in the initial finding on this issue.

Appellant in his petition averred as part of his statement of facts that there were no written performance standards for his position. The Board addressed this issue in *William E. Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). It found that agencies are not precluded from making ALOC determinations before an appraisal system has been established (*Id.*, 505). During the interim, the provisions of 5 U.S.C. 5335 (a) and 5 C.F.R. 531.407 are applicable (*Id.*, generally).

The presiding official found that the action of the agency in withholding appellant's within-grade increase was supported by a preponderance of the evidence. We held in *Parker* that appeals to the Board under 5 U.S.C. 5335 (c) fall within section 7701 (c) (1) (A) rather than (B), (*Id.*, 504), which requires proof by the lesser evidentiary standard of "substantial evidence." However, no harm resulted to appellant by the presiding official's application of the higher standard of evidence to the agency's proof.

Finally, the appellant, in his petition for review, has again raised the issue of discrimination and stated that more time was required to establish the existence of discriminatory practices. As several months have now passed since appellant filed his petition for review and no further submissions have been made, the Board concludes that the appellant has completed his presentation on this issue. We find that the presiding official considered the statistics on minority employment at the agency, the leading cases in this area, and the other factors presented, and that appellant has created no basis for review on this point.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. The appellant has a right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. Such petition must be filed in writing with the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

GRADY L. HOOD
v.
UNITED STATES POSTAL SERVICE

Docket No.
CH075209038

OPINION AND ORDER

Appellant was removed from the position of Custodial Laborer with the United States Postal Service, Gary, Indiana, effective May 3, 1979. The reasons given by the agency for its action were: (1) appellant's absence from his assigned work area without permission; (2) his failure to obey a direct order; and (3) consideration of his past disciplinary record. Appellant appealed the removal action to the Board's Chicago Field Office alleging that the action was procedurally defective, unsupported by the evidence and otherwise improper. He also incorporated a charge of racial discrimination. The presiding official found that the preponderance of the evidence supported the agency's charges and that appellant's removal was for such cause as would promote the efficiency of the service. He also determined that the appellant had not shown that his removal was based on discrimination or that it otherwise was violative of any prohibition in 5 U.S.C. 2302(b).

In his petition for review, appellant has questioned the interpretation of testimony and requested the Board to review the record for a showing of bias by the presiding official. Basically, the petitioner has questioned the presiding official's credibility determinations and his findings of the preponderance of evidence.

In arguing that the presiding official incorrectly interpreted the evidence, appellant has merely stated his disagreement with the presiding official's conclusions. He has identified no evidence and given no reason tending to show that the presiding official's assessment of the evidence was in error, other than to allege bias. As stated in *Weaver v. Department of the Navy,*[1] the petitioning party must explain in the petition why the challenged factual determination is incorrect and identify the specific evidence in the record showing the error before the Board will undertake a complete review of the record. The petitioner has failed to do this. Thus, the Board will not undertake a complete review of the record based upon this allegation.

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[1] 2 MSPB 297 (1980).

As for the contention of bias, the petitioner has only offered the "alleged" incorrect conclusions of the presiding official as evidence. It is well settled that an incorrect ruling by a presiding official, standing alone, is not evidence of bias.[2] In this case, the petitioner has failed to establish that the rulings were incorrect and has pointed to nothing else in the record to show bias. Thus, appellant has failed to state a reason which would cause us to review the record for bias. Therefore, this purported basis for review of the initial decision is also insufficient.

Accordingly, the petition for review of the initial decision is DENIED.

This is a final decision of the Merit Systems Protection Board.

The appellant has a right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. Such petition must be filed in writing with the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 29, 1980*

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[2] See *In the matter of King,* 1 MSPB 144 (1979).

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

NANCY E. PRATT
v.
VETERANS ADMINISTRATION

Docket No.
BN075209010

OPINION AND ORDER

The appeal of the agency action which reduced appellant's salary was dismissed by the presiding official due to lack of jurisdiction by the Board. The presiding official correctly ruled that the Board did not have jurisdiction in the matter because appellant was a probationary employee. 5 U.S.C. Section 7511(a)(1)(A) and 5 U.S.C. 7513.

In the petition for reveiw it is argued that since appellant completed her probationary period after filing the appeal, the Board has jurisdiction. We hold otherwise. Jurisdiction may be conferred by statute or regulation, but the Board has no power to expand or diminish its jurisdiction. The status of the parties as of the date an action is effectuated will control in deciding whether there is jurisdiction, absent some statutory exception.

Therefore, the fact that petitioner subsequently completed the probationary period does not operate to confer jurisdiction in the case. To hold otherwise would be contrary to the purpose of the probationary period because employees could appeal actions taken during probation if their impact continued after the period ended. *See* 5 C.F.R. 315.801 *et seq.; Sampson v. Murry,* 415 U.S. 61 (1974); *Jaeger v. Freeman,* 410 F.2d 528 (5th Cir. 1969).

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KARLEEN S. STARKEY
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DA075209076

OPINION AND ORDER

Appellant, Karleen S. Starkey, was removed from her position as a clerical assistant for excessive absenteeism. The Department of the Air Force, respondent, said that the action was taken because the appellant's continued illness made it necessary to replace her, but noted that there was no misconduct on appellant's part.

On appeal to the Board's Dallas Field Office, a hearing was scheduled for December 12, 1979. On December 5, 1979, the appellant's union representative filed an affidavit requesting that the hearing be postponed. The postponement was requested because the appellant's doctor advised that she should not participate in a hearing at this time since a high-stress situation would be detrimental. The doctor said that appellant had psychological and psychoneurotic health problems, but that she might be able to attend the hearing within "a month or so." The representative requested that the hearing be rescheduled in thirty days and the agency representative agreed to a postponement.

The postponement request was denied by the presiding official. The reasons for denying the request were that alternative methods to obtain appellant's testimony existed and that the doctor would not say with certainty when the appellant would be able to attend a hearing.

The hearing was held on the date scheduled; appellant was not there but her union representative was. There was no recorded discussion concerning the denial of the postponement, nor was there any mention by appellant's representative of the impact of appellant's absence.

The presiding official found that, with the exception of several hours, the appellant had been continuously absent from October 23, 1978 until she was discharged. He therefore sustained the charge. The appellant's contention that the removal would not promote the efficiency of the service was treated as an affirmative defense which the presiding official found was not proven.

The petition for review[1] generally contested the presiding official's findings on the merits of the removal action, but appellant's attorney also argued that appellant should be given a supplemental hearing because of her inability to attend the one which was held.

We conclude that the denial of the postponement request raises serious questions concerning appellant's right to a hearing, as well as the exercise of the presiding official's authority in 5 C.F.R. 1201.41, and the petition is therefore granted.

An appellant has a statutory right to a hearing, 5 U.S.C. 7701 (a). The presiding official has the authority to determine the hearing date and to take all action necessary to avoid delay, 5 C.F.R. 1201.41(b) (5). A request for postponement will be granted only when good cause is shown, 5 C.F.R. 1201.51. The issue then, is whether the appellant showed good cause for the requested postponement.

The presiding official concluded good cause had not been shown because there were alternative methods of obtaining appellant's testimony and the date she would be available was not certain.

With respect to the first of these reasons, while it is true that the Board's procedures provide for the taking of depositions, 5 C.F.R. 1201.73, the stress of cross-examination would not necessarily have been lessened under these procedures, and such stress is what the doctor advised appellant to avoid. Therefore, this method does not appear to have been viable at the time.

We agree with the presiding official's position that when a party or witness cannot appear at a hearing, the party and his representative must diligently explore all alternatives. *See Davis v. United Fruit Co.,* 402 F.2d 328 (2nd Cir. 1968). However, consideration of the doctor's statement supports the conclusion that there was no other effective alternative to personal appearance at the hearing.

The second reason, the uncertainty of the length of the delay, is valid cause for concern. However, the presiding official could have overcome this uncertainty by granting only limited postponement, as was requested. If appellant was still unable to appear, the case could then go forward.

In *Heidelberg v. Hammer,* 577 F.2d 429, at 431 (7th Cir. 1978), involving different, but analogous, circumstances, the court said,

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[1] The petition was filed on February 6, 1980, but the appellant's attorney requested, and was granted, extra time to submit additional arguments. Additional submissions were due on April 15, 1980 and the attorney's submissions were postmarked April 16, 1980. In the interest of justice we have considered the additional submissions. 5 C.F.R. 1201.12.

> In a case in which it appears that plaintiff will be released from incarceration within a reasonable time, postponement of the trial is a sensible alternative to requiring plaintiff's presence in court. When, however, plaintiff will be incarcerated for . . . years, as in this case, postponement of the trial is not a satisfactory solution.

A similar, common sense approach should be employed by presiding officials in considering requests for continuances of hearings. An appellant's right to a hearing is more than just an opportunity to testify. The appellant also has an opportunity to observe the proceedings and provide guidance to her representative. No matter how effective the representative might be, lack of access to appellant's first-hand knowledge during the hearing may prove to be a great handicap to the accurate and complete presentation of the case. Therefore, denial of a postponement request which will result in an appellant's absence should be well considered, carefully balancing the competing interests involved.

Putting this case in perspective, we find that the competing interests weigh more heavily on appellant's side. The request for postponement was limited to thirty days. There had been no prior postponements in the case, and appellant's condition was not questioned. Importantly, the agency had no objection to a delay. On the other hand, in accordance with the Congressional mandate in passing the Civil Service Reform Act, the Board strives to resolve cases expeditiously. We find, however, that this goal, by itself, is insufficient to deny a meritorious request under these circumstances. Therefore, we conclude that appellant showed good cause for postponing the hearing, and that her motion for postponement, properly supported by an affidavit, should have been granted.

Although we do not reach the merits of the case, we note that an agency must not only prove the charges levied, but must also prove that removal, based upon the charges, promotes the efficiency of the service: *Phillips v. Bergland*, 586 F.2d 1007, 1010-1011 (4th Cir. 1978). *See* also 5 U.S.C. 7513(a). Therefore, the burden is not on the appellant to prove, as an affirmative defense that removal will not promote the efficiency of the service.

The initial decision is, accordingly, VACATED. The case is REMANDED for further proceedings consistent with this opinion.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EMMA WELLS v. DEPARTMENT OF THE NAVY	Docket No. SF075209037

OPINION AND ORDER

The appellant retired from her position effective May 4, 1979. She subsequently filed an appeal with the Board's San Francisco Field Office alleging that her retirement was made under "duress" and that it was involuntary.

In the initial decision the presiding official determined that appellant's retirement was voluntary. The presiding official found no evidence of duress. Instead she found that appellant was free to choose the action she took, understood the transaction, and had sufficient time to make a reasoned decision. In addition, she noted that appellant had been contemplating retirement since as early as July 1977. Accordingly, the presiding official found that the attempted appeal of a voluntary action was not within the purview of the Board's jurisdiction and dismissed the appeal.

In her petition for review, appellant alleged that her supervisor did not tell the truth at the hearing, maintaining that she was forced into retiring.

Upon examination of appellant's petition, the Board finds that it has not met any of the criteria for review by the Board as set forth in 5 C.F.R. 1201.115. Appellant failed to cite new and material evidence that was unavailable when the record was closed. Moreover, appellant failed to establish that the presiding official was in error in her interpretation of relevant statutes or regulations.

With regard to the truthfulness of the testimony of the supervisor, appellant has identified no evidence and given the Board no reason tending to show that the presiding official's credibility determination was in error.

The Board recognizes that demeanor evidence cannot by its nature be reflected fully in the written transcript, with the result that the Board must depend heavily upon the presiding official's assessments concerning credibility. For this reason, when questions of credibility are presented, due deference must necessarily be given to the assessment of the presiding official who was present to hear and observe the demeanor of the witness: *Weaver v. Department of the Navy,* 2 MSPB 297 (1980).

In view of the deference due the presiding official's opportunity to observe the demeanor and hear the testimony of the supervisor, and the absence of a basis to warrant reversal of the presiding official's determination, we find no basis for granting the petition to review.

Accordingly, the petition is DENIED.

This is the final decision of the Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JACKIE L. WILSON
v.
DEPARTMENT OF THE NAVY

Docket No.
AT035109004

OPINION AND ORDER

The appellant is an employee of the Naval Air Station Memphis (75), Millington, Tennessee. He is serving as a Training Specialist (Foreign Military Training), GS-11, with retained grade and pay at the GS-12 level. As an employee accorded grade retention, he was registered in the agency Priority Placement Program. He appealed to the Board's Atlanta Field Office from the fact that his area of registration in that program was the Memphis commuting area rather than nationwide. In his initial decision, the presiding official found that there was no statutory nor regulatory right to appeal determinations concerning priority placement rights and dismissed the appeal as it was not within the Board's appellate jurisdiction. By Order dated December 13, 1979, the Board reopened the case for consideration of the issue of whether a challenge to the designation of an appellant's competitive area constitutes an appeal of a reduction in force under 5 U.S.C. 5366 (Supp. II 1978).

The agency filed a brief on January 7, 1980, and the appellant filed a response on January 25, 1980. The Office of Personnel Management (OPM), intervened under 5 U.S.C. 7701(d)(1) (Supp. II 1978), and 5 C.F.R. 1201.34(b) (1979). OPM filed a brief on April 1, 1980.

At the outset, it is noted that there is a fundamental difference between a competitive area for RIF situations and the area of registration in Priority Placement Program. The two programs are distinct and serve entirely different purposes. A challenge to the area of consideration in a Priority Placement Program cannot be considered a challenge to the establishment of a competitive area. In this case, the appellant appealed because he would "like to be considered for priority placement nationwide." In his response to the Board's reopening, the appellant stated, "It is my contention that the Memphis local commuting area does not offer 'reasonable opportunity for placement' for someone of my grade and qualifying series." Clearly, it is the appellant's area of consideration in the Priority Placement Program that is the subject of his challenge.

An agency Priority Placement Program is not established by or regulated under 5 C.F.R. part 351 (RIF) of the regulations. Agency Priority Placement Programs are required for employees with grade retention benefits. 5 U.S.C. 5364 (Supp. II 1978). OPM has not regulated standards for what constitutes a proper area of consideration in such a program. As noted by the agency, in Federal Personnel Manual Bulletin 273-17, dated March 5, 1979, OPM instructed agencies to provide for priority placement in an area of "sufficient size that there is reasonable opportunity for placement of most affected employees." Also, at 5 C.F.R. 536.209 (1979), OPM provides that one of the conditions that must be met for there to have been a reasonable offer of a position under the Priority Placement Program is that "The offered position must be in the same commuting area as the employee's position immediately before the offer, . . ."

The standard for competitive areas is set forth at 5 C.F.R. 351.402(b) (1979). That standard requires that a competitive area include all or that part of an agency in which employees are assigned under a single administrative authority. The Board finds that this differs considerably from the basis for the area of consideration in a Priority Placement Program. Such areas may encompass multiple administrative areas and agencies within a commuting or geographic area.

Turning then to consideration of appeal rights, 5 U.S.C. 5366 (Supp. II 1978) provides an appeal right as follows:

> (a) (1) In the case of the termination of any benefits available to an employee under this subchapter on the grounds such employee declined a reasonable offer of a position the grade or pay of which was equal to or greater than his retained grade or pay, such termination may be appealed to the Office of Personnel Management under procedures prescribed by the Office.

In the instant case, the appellant did not decline a GS-12 level position and there was no termination of his grade retention benefits. Further, the appeal he filed was directed to the Board, not OPM. The Board finds that a reading of 5 U.S.C. 5366 (Supp. II 1978), and particularly Section 5366(a)(1), establishes that it confers no statutory right of appeal to the Board. Since the appellant had received notice of his right to consideration in the Priority Placement Program in a reduction-in-force (RIF) notice, it was also considered whether he had a right of appeal under 5 U.S.C. 5366(a)(2)(B) (Supp. II 1978), which provides that nothing in that subchapter shall be construed to affect the right of an employee to appeal a RIF under procedures prescribed by OPM. RIF appeal rights are provided by regulation at 5 C.F.R. 351.901 (1979). Such rights are provided to "an employee who has received a notice of specific action and who believes that *this part* has not been correctly applied." 5 C.F.R. 351.901(a) (1979) (Emphasis added). Since 5 C.F.R. 351.402 (1979) governs the establishment of an employee's competitive area, a challenge to an employee's competitive area is appealable to the Board. 5 U.S.C. 5366 (Supp. II 1978); 5 C.F.R. 351.901 (1979). However, a competitive area need not be the same as the area of consideration in a Priority Placement Program. As these programs are not governed by 5 C.F.R. Part 351 (1979), the Board finds that challenges thereto are not appealable to the Board under 5 C.F.R. 351.901 (1979). The Board further finds that 5 U.S.C. 5366 (Supp. II 1978), has not created a right of appeal to the Board from dissatisfaction with an agency's Priority Placement Program. The Board finds, therefore, as did the presiding official, that the matter at issue is not subject to the Board's appellate jurisdiction.

Accordingly, the initial decision is hereby AFFIRMED. This is a final decision of the Merit Systems Protection Board in this case. The appellant is informed of his right to request judicial review in the U.S. Court of Appeals for the appropriate circuit or in the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 29, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WAYNE C. BABROS
v.
DEPARTMENT OF AGRICULTURE

Docket No.
SF075209077

OPINION AND ORDER

Appellant was removed, effective September 22, 1979, from his position of Supervisory Forest Technician, Tahoe, California, National Forest, for having refused reassignment. The presiding official of the Board's San Francisco Field Office affirmed the agency's action. Appellant filed a timely petition for review of that decision.

In his petition, appellant has asserted that the agency should have used reduction-in-force procedures in effecting the personnel action now under appeal; that the agency committed a prohibited personnel practice by carrying him in AWOL status for five months; that the agency wrongfully introduced a new charge, *i.e.*, insubordination, in the letter of decision; and that the presiding official had made an improper ruling regarding witnesses at the hearing. The agency responded to the merits of most of these allegations, and stated that the initial decision should be allowed to stand.

The petition is not specific as to the alleged erroneous ruling on witnesses. It appears, however, that appellant may be objecting to the presiding official's statement, appearing on page 3 of the hearing transcript and concerning the purpose of the hearing, that:

> (i)t will also be Appellant's and the employing Agency's only opportunity to submit evidence or to present witnesses as may be available at this time.

We find no error in that statement; it is clearly proper and within the scope of the presiding official's authority in conducting hearings and ruling on the evidence and witnesses. 5 C.F.R. 1201.41. Further, we note that appellant raised no objection at the hearing to any statements or rulings of the presiding official regarding witnesses. Thus, under the regulatory criteria governing Board review of initial decisions, the general claim that the presiding official made an erroneous ruling regarding unspecified witnesses does not warrant such review.

We find that every other allegation contained in the petition has been fully explored and decided by the presiding official. An appellant's disagreement with a presiding official's conclusions is generally insufficient to trigger the Board's full review of the record, under the applicable regulatory scheme. *See, e.g., Claude Weaver v. Department of the Navy,* 2 MSPB 297 (1980). The petition has not demonstrated any error on the part of the presiding official, and thus our regulatory criteria governing review have not been met.

We have held that in a removal for cause following a refusal to accept a reassignment, an agency must demonstrate by a preponderance of the evidence that legitimate management considerations were the bases for the decision to reassign. *Jack E. Ketterer v. U.S. Department of Agriculture, Federal Crop Insurance Corporation,* 2 MSPB 459 (1980). We find that the presiding official addressed that issue and that his conclusion, that the reassignment had been ordered for valid rather than for improper reasons, was based upon a proper consideration of all relevant evidence appearing in the record. We find no error in that regard.

We find that no basis has been offered which would justify the Board's complete review of the record. 5 C.F.R. 1201.115.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provides, however, that such appeal is filed within thirty (30) days of appellant's receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

GEORGE A. BURTON
v.
U.S. POSTAL SERVICE

Docket No.
CH075299022

OPINION AND ORDER

The appellant was removed from a position with the U.S. Postal Service, Cleveland, Ohio, based on charges of failure to meet total job responsibility and a history of past disciplinary actions for similar conduct. He appealed to the Board's Chicago Field Office. The initial decision was based upon the written record. The presiding official found the charges supported by a preponderance of the evidence and sustained the removal action. In his petition for review, the appellant contended, *inter alia*, that he was not given a fair decision because he was not afforded an opportunity to appear at a hearing. The agency filed no response.

The petition for appeal was filed March 28, 1979 and contained no request for a hearing. The field office acknowledged the appeal on April 9, 1979, stating in pertinent part the following:

> If you did not request a hearing in your petition for appeal, you may amend your petition to submit such a request within ten (10) calendar days after your receipt of this letter. Unless you have requested a hearing by this time, you will have waived your right to a hearing, and the presiding official will adjudicate the case on the record after providing you and the other parties the opportunity to file written submission (sic).

No response to this letter was received in the field office. The file contains, however, no evidence that the letter was ever received by the addressee (the appellant's representative) or that a copy was sent to appellant. The letter was not sent certified mail. Further, the field office failed to include either a zip code or a street address on the letter. On May 10, 1979, a follow-up letter was sent. That letter only indicated that a completed designation of representative form had to be filled out by the appellant within seven days or the appeal would be cancelled. This letter was properly addressed and was sent certified mail. The required form was promptly filed. On May 25, 1979, the field office notified the appellant that he was deemed to have waived his right to a hearing by his failure to amend his petition for appeal and that the record on the case would close seven days after his receipt of the letter. This was also sent certified mail and the return receipt shows that it was received on June 1, 1979. By letter dated June 5 and received in the field office on June 7, 1979, the appellant responded, requesting a hearing. The initial decision, issued June 18, 1979, states on page 3 that the appellant had been notified of the right to request a hearing but that he did not do so.

The appellant's right to a hearing is clearly provided by law and regulation: 5 U.S.C. 7701(a) (1); 5 C.F.R. 1201.24(c) (1979). He may, however, waive that right. Waiver has been defined as the intentional relinquishment of a known right: *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938); *Chambers & Co. v. Equitable Life Assurance Society,* 224 F.2d 338, 345 (5th Cir. 1955); *Phillips v. Lagaly,* 214 F.2d 527, 529 (10th Cir. 1954). Generally, to make out a case of implied waiver of a legal right, there must be a clear, unequivocal and decisive act of the party showing such a purpose to abandon or waive the legal right, or acts amounting to an estoppel on his part: *United States v. Chichester,* 312 F.2d 275, 283 (9th Cir. 1963); *Pacific States Corporation v. Hall,* 166 F.2d 668, 671 (9th Cir. 1948); *Hunter Mill Co. v. Koch,* 82 F.2d 735, 736 (10th Cir. 1936); *Victor Products Corp. v. Yates American Mach. Co.,* 54 F.2d 1062, 1064 (4th Cir. 1932).

The record contains no indication that the appellant ever received the April 9, 1979 notice that he could request a hearing. The record further contains no indication why the presiding official did not respond to the appellant's June 5th request for a hearing, or why he stated in the initial decision that no request for a hearing had been made. Considering these circumstances with the fact that the appellant filed timely responses to all field office requests which he clearly received, the Board finds that there has not been "a sufficiently clear, unequivocal and decisive act as to establish waiver of an important legal right." *Lynn v. Bureau of Indian Affairs,* 1 MSPB 331,332 (1980). *See* also 44 Fed. Reg. 38343 (June 29, 1979) where we stated, in connection with the publication of our final regulations, that service would be made by the Board on both the representative and the appellant, in order to assure notice to both. While that comment had specific reference to the service of pleadings, we find no reason to apply it restrictively so as not to provide for service of documents concerning a hearing on both appellants and their representatives.

The Board, therefore, finds that appellant did not waive his right to a hearing and that the presiding official's issuance of a decision without affording appellant the hearing he requested was a violation of his rights under 5 U.S.C. 7701(a) (1).

Accordingly, the petition for review is granted. The June 18, 1979 initial decision is hereby VACATED and the case is REMANDED to the presiding official for the purpose of holding a hearing and for further appropriate processing.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

UHRICO CADENA v. DEPARTMENT OF JUSTICE	Docket No. DA075209047

OPINION AND ORDER

Uhrico Cadena was removed from the position of Immigration Detention Officer with the Department of Justice, Immigration and Naturalization Service, Southern Region, Houston District, Houston, Texas, effective July 27, 1979, based on charges of falsification of employment documents and unauthorized use of a government vehicle. He appealed his removal to the Dallas Field Office of the Merit Systems Protection Board, asserting that: (1) the agency official who decided upon his removal had prejudged the matter prior to the formal proposal of removal; (2) the appellant had not intended to falsify employment documents; and (3) the charges were not serious enough to warrant removal. In an initial decision issued on December 17, 1979, the presiding official affirmed the agency's removal action.

The first charge leveled by the agency was that the appellant had falsified employment documents. As evidenced in the record on appeal, the agency's announcement for the Immigration Detention Officer position for which the appellant was selected had specified that the incumbent of that position was required to possess a valid driver's license in order to transport detainees by motor vehicle. Nonetheless, in responding to questions regarding arrests and convictions (other than minor traffic violations) when completing government forms for initial application, security clearance, and government driving permit, the appellant listed only two incidents of receiving fines for driving while intoxicated. The appellant omitted any reference to a series of arrests and fines over $30.00 for speeding and operating a vehicle without a license, an arrest for making alcoholic beverages available to a minor, a conviction and two years' probation for drunken driving, and another arrest for drunken driving and possession of a loaded firearm, resulting in three years' probation and a suspension of his driver's license for six months. In response to a specific question in the government driving permit form asking whether he had ever had his driver's license suspended, the appellant indicated that he had not. An appeal of the suspension of his driver's license was still pending when the hearing before the Board's presiding official was held on October 11, 1979.

The second charge leveled by the agency involved the appellant's unauthorized use of a government vehicle, in violation of the agency's announced policy requiring prior written authorization. The appellant admitted his culpability, but sought to mitigate the seriousness of the charge by explaining that he drove the vehicle to his residence after working overtime very late one night. He had decided not to drive first to the agency facility to drop off the vehicle, and then to his home, because that would have taken an hour longer than driving straight home after completing his assignment, and he was due back at the agency facility early the next day.

The presiding official found "no evidence" to support the appellant's contention that the agency's deciding official had prejudged the appellant's case. He concluded that both charges were supported by the preponderance of the evidence, and that removal based on those sustained charges promoted the efficiency of the service.

In his petition for review of the initial decision of the presiding official, the appellant set forth three main contentions:

> (1) That the initial decision violates the well-established principles of the merit systems;
>
> (2) That it violates the due process clause of the Fifth Amendment to the U.S. Constitution; and
>
> (3) That the agency's removal action is not supported by the preponderance of the evidence.

We will consider each of these contentions in turn.

The appellant argued, first, that the agency and the presiding official erroneously omitted consideration of the appellant's overall job performance in concluding that he should be removed from the service. Such consideration is required, he asserted, in accordance with the merit systems principles mandating that the Federal work force be used efficiently and effectively, and that employees be retained based on the adequacy of their performance. 5 U.S.C. 2301(b)(5) and (6). The appellant pointed out that his removal was based primarily on events occurring prior to his employment.

The Board finds no inconsistency in the two merit systems principles referred to and the appellant's removal for falsification of employment documents, as well as for unauthorized use of a government vehicle. Another merit systems principle decrees that all employees should maintain high standards of integrity, conduct, and concern for the public interest. 5 U.S.C. 2301(b)(4). As the record on appeal shows, all three of the government forms completed by the appellant, containing obviously incomplete information regarding his arrests and convictions, conclude with a signed certification as to the truth and good faith of the statements made in those forms. Two contain warnings that false statements are punishable by law, and the job application form further warns that false statements may be grounds for not employing an applicant or for dismissing him after beginning employment. Moreover, the agency expressly conditioned the appellant's employment upon a background investigation's establishing his suitability for the position. Hearing Transcript at 12 and 42. The appellant was, therefore, clearly on notice from the ouset that full and truthful disclosure of prior arrests and convictions was a pre-condition of his employment. His performance in the position to which he was appointed as a result of falsification of employment documents has no relevance to the falsification charge.

The appellant contended further in his petition for review that his due process rights were violated because the agency official who decided finally upon his removal had told him at a meeting, which took place before his removal had been formally proposed by the agency official's subordinate, that the deciding official intended to terminate the appellant's employment with the agency. This contention is supported by the appellant's testimony at the hearing. Hearing Transcript at 64. It is contradicted, however, by the testimony of the deciding agency official. The agency's district director testified that he met with the appellant to determine whether the investigative report on his arrests and convictions was accurate, but that he never indicated action would be taken against the appellant. Hearing Transcript at 52-53 and 56. He testified, further, that he did not reach a decision to effect the appellant's removal until after the appellant responded orally to the notice of proposed removal. Hearing Transcript at 52.

In his initial decision, the presiding official discussed the procedural requirements of 5 U.S.C. 7513 and the corresponding regulations, finding that they had been met. He also discussed the testimony of the witnesses relating to the due process issue, noting that "for a deciding official to have already decided the case would violate fundamental due process." Initial Decision at 7. He found, however, that there was "no evidence" to support the appellant's prejudgment argument. *Id.* The presiding official obviously concluded that the agency witness's testimony was more credible than the appellant's on this issue. Since the appellant has failed to demonstrate in his petition for review that the initial decision is based on an erroneous interpretation of the statutory standards governing the weight of the evidence, the Board will accord its usual due deference to the presiding official's credibility findings. *Weaver v. Department of the Navy*, 2 MSPB 297 (1980) at 299.

Finally, the appellant posited in his petition for review that the agency's removal action is not supported by the preponderance of the evidence. In support of this contention, the appellant sought to distinguish between falsification and omission in that the former requires the specific intent to deceive, which the appellant had lacked. He urged that the phrasing of the questions on the government forms included "legal" terms that were so unclear to the layman as to result understandably in certain omissions. He asserted, further, that the fact that he did disclose two incidents of driving while intoxicated negates any intent to falsify his employment documents. He urged that very few people can remember all of the times they were stopped for speeding and the amounts of the various fines imposed throughout a lifetime.

The Board agrees that a charge of falsification of employment documents can be sustained only upon a finding of intent to deceive or mislead. *See Tucker v. United States*, No. 206-78, slip op. at 6 (Ct. Cl. June 18, 1980); *United States v. Lange*, 528 F.2d 1280, 1286 (5th Cir. 1976); *see* also *Allen v. U.S. Postal Service*, 2 MSPB 582,584 (1980). Nonetheless, the appellant's line of argument that he lacked the requisite intent overlooks the fact that he had been briefly imprisoned and was serving two overlapping probation periods, as the result of two convictions for driving while intoxicated, at the time he applied for the Immigration Detention Officer position. It also overlooks the fact that the appellant had been charged with possession of a loaded firearm and with making alcoholic beverages available to a minor. These are not the types of charges and convictions that one tends to forget in applying for a position as a law enforcement officer.

Moreover, that line of argument by the appellant fails to acknowledge that he also stated in writing that his driver's license had never been revoked or suspended, while in fact it had. Most important with regard to the appellant's intent to falsify employment documents, the appellant admitted at the hearing that he did not disclose all of his arrests and convictions because he feared it would preclude his being hired by the agency: Hearing Transcript at 78. *See* also Hearing Transcript at 48. The Board finds therefore, that the charge of falsification of employment documents was indeed supported by the preponderance of the evidence.

As for the charge of unauthorized use of a government vehicle, which was also admitted by the appellant, the Board agrees with the appellant's inference that it is questionable whether removal would be warranted based on that charge alone, in light of the particular circumstances of the incident. However, considering that the appellant's supervisor testified that prior to the incident he had told the appellant of his own experience of having to return a government vehicle late at night under similar circumstances because of the agency's strict policy regarding the use of its vehicles, Hearing Transcript at 37 and 39-40, the Board finds the second charge serious enough to weigh in favor of the appellant's removal, when considered together with the first charge upon which the appellant's removal was based.

The appellant's final allegation that there must have been ". . . something else as the basis of the removal that has not appeared in the evidence submitted at the hearing or evidence documented by exhibits" lacks the necessary specificity for serious consideration by the Board. The agency established at the hearing that its Immigration Detention Officers are expected to be people of high integrity, Hearing Transcript at 12, 26, and 45, and that the appellant would probably not have been hired as an Immigration Detention Officer if he had fully disclosed his arrests and convictions for driving violations, primarily because of the importance of safe driving habits in executing the duties of that position, Hearing Transcript at 12, 33-34, and 43-46. The agency established, further, that between 1977 and 1979 it had terminated the employment of four other agency employees for falsification of employment documents by omitting information concerning arrests and convictions. Hearing Transcript at 8, 18-19, and 24-25. The Board concludes, therefore, that the two charges discussed do support removal for such cause as will promote the efficiency of the service. 5 U.S.C. 7513(a); *Rodriguez v. Seamans*, 463 F.2d 837, 842-43 (D.C. Cir.), *cert. dismissed*, 409 U.S. 1094 (1972).

Accordingly, the petition for review is GRANTED and the initial decision dated December 17, 1979, is AFFIRMED.

This is the final decision of the Merit Systems Protection Board. The appellant is hereby advised of his statutory right under 5 U.S.C. 7703 to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty calendar days of receipt of this decision by the Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RICHARD Y. CHRISTIAN v. U.S. POSTAL SERVICE	Docket No. SL075299006

OPINION AND ORDER

The petition for review filed July 16, 1979, by Richard Y. Christian, appellant, requesting review of the initial decision of June 18, 1979 is DENIED.

Appellant was removed from his position, effective April 27, 1979, by the U.S. Postal Service, respondent, for alleged theft of U.S. mail matter and a U.S. postal money order. He filed an appeal of the action with the Board's St. Louis Field Office on May 17, 1979, and the Board responded to the appellant in a letter dated May 18, 1979.

In the May 18 letter, appellant was informed of his right to request a hearing within 10 days if such a request had not been made in the appeal letter. No such request had been made. Appellant was further informed that failure to request a hearing would constitute waiver of same, and in that case, a decision would be based on the written record. A designation of representative form was attached to the letter. Appellant executed and returned the form as directed in the letter.

After respondent submitted its records, appellant was informed, on June 1, that the record would close June 11, 1979. On June 11, appellant requested and was granted an extension until June 12, to submit evidence. The record closed June 12, 1979.

The agency's evidence consisted of affidavits, an investigative memorandum, with exhibits, and a two page handwritten statement by appellant, wherein he admitted taking a money order to his home, and removing coins from envelopes and putting them in his shirt pocket. There was independent evidence in support of these admissions.

Appellant's submissions consisted of character statements written by various persons and a petition of support by co-workers. A written statement from the American Postal Workers Union President, appellant's designated representative, did not mention or request a hearing.

The presiding official found the charges to be supported by a preponderance of the evidence, and concluded the removal would promote the efficiency of the service. Accordingly, the action was affirmed.

Appellant contacted the presiding official after receipt of the decision, and inquired about waiver of the hearing. The presiding official reminded him of the May 18 letter, and informed him of procedures for appealing the decision. In the petition for review, appellant asserted he was denied a right to a hearing. He argued that he thought the written submissions were a prelude to the hearing, that they "were to be used to obtain a hearing of this case."

The issue before the Board is whether appellant waived his right to a hearing by failing to request one.

Appellant's right to a hearing is established in 5 U.S.C. Section 7701(a)(1). The Board's interim regulations, which were in effect when the initial appeal was filed, provided that an appellant may waive his right to a hearing and in such case a decision will be made on the written record. 5 C.F.R. 1201.23, 44 Fed. Reg. 3948 (1979).[1] Thus an appellant who has a right to a hearing can waive such right if he so desires.[2]

Waiver has been defined as the intentional relinquishment of a known right. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Thus it must be ascertained if appellant knew of his right to a hearing. *See Government of the Canal Zone v. Peach,* 602 F.2d 101 (5th Cir. 1979), where the court held that, having been informed of a right, it was incumbent on the appellant to indicate that he wanted to exercise that right or he would be deemed to have waived it.

In *Lynn v. Bureau of Indian Affairs,* 1 MSPB 331 (1980) we held that appellant's failure to appear at a scheduled hearing did not constitute waiver of his right to a hearing. In *Lynn,* the appellant had requested a hearing, but his Post Office Box had been closed due to non-payment of rental fee and he claimed not to have received notice of the hearing. It was concluded that appellant's short-term unavailability, from July 10 to July 25, 1979, was not a sufficiently clear, unequivocal and decisive act to establish waiver.

In *Walton v. U.S. Postal Service,* 2 MSPB 60 (1980), however, we held that the failure of appellant to request a hearing constituted waiver. In *Walton,* the appellant had received forms and letters which contained information about the necessity to request a hearing.

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[1] The final regulations provide a suggested form which require appellants to indicate whether they desire a hearing by checking yes or no. 5 U.S.C. Chapter II, Part 1201, Appendix I.

[2] Since an agency has no statutory right to a hearing, an appellant may decide it advantageous not to request a hearing.

It is clear in this case that appellant received the notices sent by the Board. The May 18 letter informed appellant he could, if he desired, request a hearing. Further, he was informed that a decision would be based upon the written record if he did not wish to have a hearing. Appellant received the letter, and returned the designation of representative form, thereby indicating an understanding of the communication from the field office.

He was informed, in the June 1 letter, that the record would be closed on June 11. He called the field office to request an extension to June 12, once again evidencing an understanding of the processing of the case. The extension was granted. Appellant never mentioned or inquired about a hearing until after the unfavorable decision. Further, his designated representative also failed to preserve the hearing right.

Upon the facts of this case, we conclude appellant was aware there would be no hearing unless he so requested, and that he intentionally relinquished this right. We find therefore, that he has failed to show error in the decision of the presiding official in this regard.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days from the receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

SARA E. COOPER v. DEPARTMENT OF THE AIR FORCE	Docket No. DA075299020

OPINION AND ORDER

The appellant was removed from a position with England Air Force Base, Alexandria, Louisiana, for refusal to report to work as ordered. She appealed to the Board's Dallas Field Office. In the initial decision, the presiding officer found the reason for the removal supported by a preponderance of the evidence and sustained the action. In her petition for review, appellant has contended that the initial decision is not supported by the weight of the evidence and that she wishes to submit additional medical evidence. The agency filed no response.

The appellant has not actually been on duty with the agency since May 1977. At that time, she fell while at work and allegedly injured her lower back and hips such that she has not been able to return to work. The appellant received workers' compensation until January 1978. The agency granted the appellant additional leave without pay while the matter of her continued compensation was being considered by the Department of Labor. After a determination by the Department of Labor that she was not entitled to compensation after January 1978, the agency contacted the appellant and requested that she return to work. She did not report for duty and eventually was removed effective April 20, 1979.

Appellant has stated that she wishes to submit new evidence establishing her disability. She has not, however, contended that the presiding official erroneously interpreted any statute or regulation.

By letter dated October 3, 1979, the appellant was granted an additional 30 days to submit evidence and argument in support of her petition for review. To date, however, no new evidence has been submitted. Accordingly, the Board finds that appellant has failed to prosecute her petition. *See Bennett v. Department of the Navy,* 2 MSPB 93 (1980).

Therefore, the petition for review is DISMISSED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order: 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MICHAEL L. FYE
v.
UNITED STATES POSTAL SERVICE

Docket No.
CH075209016

OPINION AND ORDER

After appellant was removed from the agency he filed an appeal with the Board's Chicago Field Office, but the presiding official dismissed the case, finding that the appeal was untimely filed. Appellant now petitions the Board to review that decision. Because this case presents significant issues concerning the acceptance of petitions for appeal by field offices, the petition is GRANTED.

The record before the Board shows that the agency decided to remove appellant effective March 3, 1979, and that the decision letter advised appellant of his right to file an appeal with the Board, of the location of the appropriate field office, and of the time limits for filing.[1] On March 14, 1979, appellant wrote the field office stating:

> I am a disabled veteran and was fired from the U.S. Postal Service on 3-3-79 do (sic) to reasons I do not understand.
>
> I'm requesting information as to what I need to submit for an appeal to your office.
>
> Please advise me on this matter, I'm asking for your help.

This letter was received on March 16, 1979, and on that date the presiding official wrote the following:

> This is in response to your question for information regarding appeals procedures.
>
> Copies of the pertinent regulations are attached. Please especially note the time period allowed for filing. If you have any further questions on the procedures for filing an appeal, you may contact Mr. Leonard Slobodin of our staff at (303) 353-8905.

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[1] The agency advised appellant that an appeal had to be filed within 15 days after March 3, 1979 (the time allowed by the Civil Service Commission), rather than the 20 days provided for in 5 C.F.R. 1201.22(b). Because the notice advised appellant of a time limit shorter than that allowed, and because of events described in this opinion which occurred thereafter, the Board finds that the agency error did not impair appellant's exercise of his appeal right.

There was no further communication from appellant until September 11, 1979. On that date the field office received a letter stating:

> On March 16, 1979, I received from your office a copy of rules and regulations for appeals procedures.
>
> A misunderstanding occurred, because I was requesting from your office a hearing to appeal on actions of dismissal and (fines), dated 3-1-79 from the United States Postal Service through the veterans preference act.
>
> I was to be given (15) days after March 3, 1979, but was told by the local union to wait until after the step 3 report was made, case No. C8C-4B-D-3483 dated 7-19-79 which was denied and stated, "No appeal for he is going through the veterans preference act."
>
> Which now I'm told that it is too late for this appeal to the veterans preference act, and also for the grievance arbitration stage.
>
> On 3-3-79 I was fired from work, pending the grievance procedures, steps 1, 2, and 3, also I was told to wait for all the steps for a decision and to seek advice in other areas to appeal to . . .

The appeal was duly filed, but on October 17, 1979, the presiding official wrote appellant on his own motion, explaining that although the appeal was untimely filed he would allow appellant an opportunity to submit evidence or argument establishing good cause for a waiver of the time limit. Appellant did not respond, and, after waiting a reasonable time, the presiding official dismissed the appeal.

In appellant's petition for review he stated:

> I was told through my local union, "American Postal Workers Union," to wait for a decision at the step 3 level, but in case of denial at step 3, to look elsewhere and seek out information for other help in this case . . .
>
> But now the union says that they told me to write to the Merit Systems Protection Board, which they told me to go through the union and I would get a better deal . . .

The Board has carefully reviewed this correspondence in order to determine if there is any reasonable basis upon which it may grant an appeal, but it cannot conclude that the letter of March 14 constituted a petition for appeal, or that the field office was obligated to treat it as such. In his discretion, the presiding officer could have treated the letter as an appeal, and the Board does not doubt that similar letters have been regarded in such a manner by other presiding officials. Indeed, the Board encourages a liberal interpretation in order to minimize the number of appeals which are rejected as untimely. Nonetheless, this presiding official took the letter at its face value, and provided information only; it was not erroneous for him to have done so.[2]

Moreover, the contents of appellant's September 11 letter establish that he deliberately chose the agency grievance procedure in lieu of pursuing an appeal with the Board. It was only after he was told that he had exhausted his remedies in that area that he returned to the Board.[3]

Accordingly, the initial decision of the presiding official is AFFIRMED. This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b). Appellant is advised of his right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this Order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

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[2] Had appellant taken reasonably prompt action to indicate that he did intend his March 14 letter to constitute a petition for appeal, he would have made out a good case for an extension of time for filing. But he did not do so. Rather, he waited some six months, an unreasonable length of time for someone who is intent upon actively pursuing restoration of his job through the Board's appeal process.

[3] Assuming that appellant's statements are accurate, it appears that he was misinformed by his union concerning his right to pursue an appeal with the Board after electing the agency grievance procedures. Nonetheless, these errors do not constitute good cause for an extension of time in which to file a petition for appeal. Appellant's union is responsible for properly advising appellant of his appeal rights. Moreover, if the agency mistakenly denied him the opportunity to pursue the grievance procedures further, this is a matter which appellant should bring to the attention of the agency, not this Board. The record also reflects that the last grievance decision was issued on July 10, 1979. It was this decision which indicated that appellant had a "continuing existence of an appeal under the Veterans Preference Act . . . " Appellant's subsequent two month delay in writing to the Board was never explained by him.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KEVIN GREEN
v.
UNITED STATES POSTAL SERVICE

Docket No.
CH075299045

OPINION AND ORDER

Appellant was removed from his position as Security Police Officer for alleged inattentiveness in the discharge of his duties. Specifically, the agency charged that appellant had been found by his supervisor in his patrol vehicle with his head resting on the back of the car seat, in a "relaxed position," with his eyes closed. The appellant's vehicle was allegedly parked outside of the agency's parking lot, in a city lot, and he had not responded to previous attempts by the control center to reach him by radio. Three prior suspensions on appellant's past record were also considered by the agency in reaching its decision to remove him; two were for inattentiveness in the discharge of his duties, and the other was for disregarding instructions.

The presiding official of the Board's Chicago Field Office affirmed the agency's action. Appellant petitioned for review, and the agency responded.

Appellant alleged "certain discrepancies in the criteria used in reaching the decision, procedural errors and insufficient evidence supporting Managements (sic) claim."

First, he stated that certain oral statements were attributed to him on page 2, paragraph 5 of the decision, which he had not made. Our review of the record has revealed that the oral statements in question were derived from two documents contained in the agency's adverse action file; one from an internal memorandum written by appellant's supervisor stating "(h)e says he is sorry and that he was caught," and the other from the management summary of appellant's oral response to the charge, stating that he had admitted that the "only disagreement" he had with the charge was that he did not have his eyes closed for three to five minutes.

We note, initially, that although the documents in question were hearsay, it was not error for the presiding official to admit and consider them. Hearsay evidence is admissible in administrative proceedings; but whether it may constitute evidence sufficient to support an agency's action which is adverse to the appellant must be weighed in light of the whole record, and by comparing its credibility against that of the contrary evidence. *Richardson v. Perales*, 402 U.S. 389 (1971); *Reil v. United States*, 456 F.2d 777 (1972).

The record shows that the two statements now at issue had been included by the agency in its adverse action file, which was submitted to the presiding official and to the appellant's representative. Appellant was thus aware of them in a timely manner and was afforded ample opportunity to prepare a rebuttal prior to the hearing, to specifically deny having made the statements, to call as witnesses those individuals who had recorded his alleged statements and signed the documents, or, at the very least, to object to the admission of the documents. We find that appellant, represented by counsel, availed himself of none of the rights just enumerated.[1]

The hearsay evidence at issue did not lack probative value, nor did it consist of unsubstantiated rumor, surmise, conjecture or speculation. The two statements consisted of admissions allegedly made by appellant himself. Upon appellant's failure to clearly and unequivocally deny having made the statements,[2] as well as upon his failure to call the declarants for cross-examination or to object to the admission of the documents, it was proper for the presiding official to conclude that appellant had made the statements now contested. In view of the circumstances of this case, we hold that it was not error for the presiding official to find that the hearsay documentation comprised evidence sufficient to aid in sustaining the agency's adverse action.

Next, appellant disputed several of the presiding official's conclusions. In arguing that the presiding official incorrectly interpreted the evidence, appellant has merely stated his disagreement with those conclusions. However, Board review of the presiding official's fact finding will ordinarily be undertaken only when the petitioning party makes a showing consistent with 5 C.F.R. 1201.115(b), which requires a demonstration that the initial decision is based on an erroneous interpretation or application of the statutory requirements governing the weight of the evidence. *Claude Weaver v. Department of the Navy*, 2 MSPB 297 (1980). Appellant's petition has demonstrated no such error warranting the Board's complete review of the record.

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[1] Appellant's counsel did move, on the morning of the hearing, to have the supervisor called as a witness. That motion was denied as untimely, as the hearing would have had to have been delayed (a second time) in order to accommodate the request. The presiding official's denial of the motion was proper under the circumstances and within the scope of his authority under 5 C.F.R. 1201.41.

[2] However, we note appellant's testimony that he did "not recall" having made the statement contained in the management summary and that he "disagreed" with it, (Tr. p. 61, lines 13-21), and considered it "somewhat opinionated" (Tr. p. 66, line 3); further, we note that he did deny the charge that he had been sleeping when he was found. (Tr. p. 52, lines 4-8).

Finally, appellant referred to written proof, which he did not have with him on the day of the hearing, that the supervisor who had allegedly caught him had given preferential treatment to another officer over him. Appellant has made no showing of due diligence with respect to his failure to produce that evidence before the record was closed, nor has he stated that it was unavailable before that time. He has, therefore, plainly failed to satisfy the requirements of the Board's regulations governing reviews based upon allegations of newly discovered evidence. 5 C.F.R. 1201.115 (a). Further, we are unable to consider the alleged new evidence for the additional practical reason that appellant has not forwarded it to the Board for our consideration and review.

Accordingly, the petition is DENIED.

This is a final decision of the Merit Systems Protection Board. Appellant is hereby notified of his right to appeal this decision in the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided, however, that such appeal is filed within the thirty (30) days of appellant's receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

MARY K. HATLER
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
DA043209007

OPINION AND ORDER

I. BACKGROUND

The appellant, Mary K. Hatler, filed an appeal with the Dallas Field Office of the Merit Systems Protection Board from a personnel action of the Department of the Air Force, Randolph Air Force Base, Texas, reducing her in grade and reassigning her from the position of Administrative Officer, GS-9, to that of Suggestion Clerk (Typing), GS-4, effective November 8, 1979, based upon the agency's determination of unacceptable performance by the appellant. After the appeal had been filed but before the scheduled hearing took place, the agency advised the presiding official by letter that it was cancelling the appellant's reduction in grade and restoring her to her previous position as of February 24, 1979. In the same letter, the agency indicated further that it intended to process another, proper adverse action against the appellant in keeping with the decision of the Board in *Wells v. Harris*, 1 MSPB 199,237 (1979).

In an initial decision dated February 28, 1980, the presiding official dismissed the appeal without prejudice, finding a lack of appellate jurisdiction. The presiding official explained that since the action appealed from had been cancelled, there was no longer any allegedly wrongful action for the Board to right. He pointed out, however, that the Board's jurisdiction would reattach upon the appellant's filing a new petition for appeal if and when the agency initiated another adverse action against the appellant.

II. ISSUES RAISED FOR REVIEW

On March 19, 1980, the appellant filed a timely petition for review of the initial decision, arguing that the presiding official erroneously interpreted existing law, rule and regulation when he dismissed the appeal without prejudice and failed to rule on the appellant's allegations of harmful procedural error and the prohibited personnel practices of discrimination and reprisal. The appellant contended in her petition for review that the cancellation of the reduction in grade by the agency "does not correct the overt discrimination and reprisal shown on the record." The appellant requested, therefore, that the initial decision be reversed and that the case be remanded to a different field office for awards of back pay and reasonable attorney fees.

On March 24, 1980, the appellant filed an amendment to her petition for review complaining that subsequent to the dismissal of her appeal the agency had refused payment of her back pay and attorney fees, and had given notice of her proposed removal. The appellant argued in her amended petition that allowing a dismissal in such a case would, in effect, permit a "loophole" in the regulations of the Board because an agency could always escape "culpability" for its prohibited personnel practices and avoid payment of attorney fees, simply by cancelling the personnel action being appealed.

The agency was given an opportunity to respond to the appellant's petition for review, but has filed no response.

III. DISCUSSION AND CONCLUSIONS

The appellant has argued in her petition for review that there is a statutory requirement at 5 U.S.C. Section 7702 (Supp. II 1978) that the Board must render a decision on the merits with respect to all allegations of discrimination and reprisal. The Civil Service Reform Act of 1978 does indeed provide at 5 U.S.C. Section 7702(a)(1) (Supp. II 1978) that the Board must issue a decision, within 120 days of the filing of an appeal, when the appellant "... has been affected by an action which (he or she) may appeal to the Merit Systems Protection Board, and . . . alleges that the basis for the action was discrimination." By the terms of this provision and the regulations of the Board promulgated thereunder, however, if the appellant cannot show that she "has been affected" by an appealable action, there is no requirement that the Board render a decision on the merits of the appeal. Actions that are appealable to the Board under 5 U.S.C. Sections 7512, 7513, and 7701 (Supp. II 1978) include, of course, a reduction in grade, but when such an action has been cancelled, as here, there is no longer an appealable action which affects the appellant. The Board is prohibited by 5 U.S.C. Section 1205(g) (Supp. II 1978) from issuing advisory opinions.

The appellant has argued further in her petition for review that she is entitled to a decision on her claims of prohibited personnel practices effected by the agency because of their general significance. But the desirability of an adjudicatory determination of important questions, standing alone, does not prevent a case from being dismissed as moot. *Marchand v. Director, U.S. Probation*

Office, 421 F.2d 331, 333 (1st Cir. 1970). Moreover, the record indicates that the Office of the Special Counsel has reviewed the appellant's claims and found no evidence of prohibited personnel practices within the scope of its investigative authority.

As held in *Network Project v. Corporation for Public Broadcasting*, 561 F.2d 963, 968 (D.C. Cir. 1977), *cert. den.*, 434 U.S. 1068 (1978), mootness must be determined solely by reference to the allegations of the complaining party. The original petition for appeal herein indicates that the agency action being appealed was the appellant's reduction in grade from GS-9 to GS-4. The record discloses that the appeal was dismissed by the presiding official on the representation by the agency, in its letter to the presiding official received on February 12, 1980, that the agency intended to cancel its action and restore the appellant to her former position. The record discloses, further, that the agency indicated in a memorandum to the appellant that it would give the appellant back pay at her former GS-9 rate and restore her to her former position as of February 24, 1980.

Thus, the appellant appears to have been returned to the *status quo* before the agency initiated its action appealed from, rendering this appeal moot. The appeal is moot in fact, however, only if the agency complies with its representations that it will restore the appellant to her former position as of November 8, 1979, the date she was reduced in grade, and give her back pay for the difference between her reduced salary and her former salary. Complaints regarding such compliance should be raised with the Chief Appeals Officer of the Dallas Field Office, in accordance with the regulations of the Board at 5 C.F.R. Section 1201.112 (1979).

With regard to the appellant's request for attorney fees, the correct procedure is to file a motion for such an award with the presiding official within fifteen days after the date on which this opinion of the Board is issued. *See* 5 C.F.R. Sections 1201.37(a) and 1201.113(b) (1979).

Accordingly, the petition for review of the initial decision dated February 28, 1980, is DENIED.

This is the final decision of the Merit Systems Protection Board. The appellant is hereby advised of her right to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within (30) thirty calendar days of receipt of this decision by the Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

BEVERLY LEWIS
v.
DEPARTMENT OF JUSTICE

Docket No.
DC315H09007

OPINION AND ORDER

Appellant was removed from her position of Clerk-Typist, effective October 2, 1979, because of her alleged unsatisfactory performance. The agency considered that she had been serving her 1-year probationary period at the time of her removal, as she had been appointed to the career-conditional position effective October 8, 1978.

She appealed, asserting that her prior service as a Student Aide should have been credited toward the completion of her probationary period and that she was thus not a probationary employee at the time of her separation. Appellant had served two consecutive 6-month appointments as Student Aide with the respondent agency, and that service had expired on September 30, 1978.

Appellant alleged further that the agency's action had been based upon racial discrimination, and that procedural irregularity had occurred, in that the agency had been required to evaluate her at a certain point and had failed to do so.

In his initial decision of November 30, 1979, the presiding official of the Board's Washington, D.C. Field Office found that appellant had been probationary when she was separated and he dismissed her appeal as not being within the purview of the Board's appellate jurisdiction.

Appellant's petition for review was received on December 28, 1979, realleging that she had not been probationary when separated and that procedural error had occurred. The allegation of racial discrimination has not been repeated in the petition.

The agency's response was received on February 5, 1980, urging that the initial decision of the presiding official had been correct and that appellant's petition had not met the Board's criteria for review. *See* 5 C.F.R. 1201.115.

We find no error in the presiding official's upholding of the agency's decision not to credit appellant's past service toward the completion of her probationary period.

An "employee" having a right to appeal to the Board under Chapter 75 of Title 5, United States Code, is defined at section 7511(a)(1)(A):

> an individual in the competitive service who is not serving a probationary or trial period *under an initial appointment* or who has completed 1 year of current *continuous* employment *under other than a temporary appointment limited to 1 year or less;* (Emphasis supplied)

Appellant's prior service in the two time-limited excepted appointments, which were made under 5 C.F.R. 213.3102(w), did not constitute a trial period to be credited toward completion of the probationary period. Rather, her probationary period commenced upon her competitive appointment. Since prior service in temporary appointments limited to terms of 1 year or less are excluded by statute from being credited toward completion of a probationary period, the criteria set forth at FPM 315, App. A-3 regarding the crediting of prior service do not apply to such appointments.

Further, as we have found that appellant was probationary at the time of her termination, it follows that the dismissal of her appeal for lack of jurisdiction was proper, for reasons explained in the initial decision. Appellant has not questioned the presiding official's analysis of pertinent law in that regard, and we find that that analysis was correct.

Accordingly, the petition is DENIED. This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JAMES M. LEWIS
v.
U.S. MARINE CORPS

Docket No.
SL075299008

OPINION AND ORDER

The petition for review filed August 2, 1979, by appellant is hereby GRANTED, based upon our finding that the record as presented is inadequately developed to allow for just resolution of this case.

Appellant was removed from his position as Repair and Maintenance Estimator based on the allegation that he failed to promptly and properly process a complaint concerning a gas leak in a housing unit over which he had responsibility.

The record is incomplete with respect to the office procedures allegedly violated, which is necessarily critical to the just adjudication of the case. Additionally, reference is made to certain "secretary's records," which purportedly reflect the proper handling of the work orders, such as the recording of the complaint in this case, but such records are not in the appeal file. Their production, too, is necessary to the proper disposition of the case.

A decision will not be sustained unless supported by a preponderance of the evidence. 5 U.S.C. section 7701(c) (1) (B). The inadequate state of the record in the instant case is attributable to failure by both parties to provide the presiding official with sufficient evidence to make an informed decision. Additionally, in cases such as this, where the initial decision is issued without a hearing, in the interest of justice the presiding official should monitor the submissions closely, and request additional evidence when appropriate. Without becoming an advocate of one party or an adversary of the other he must exercise the authorities granted at 5 C.F.R. section 1201.41 (see particularly subsection 1201.41 (b) (8) and (9)), so as to assure that the initial decision is issued in compliance with 5 C.F.R. section 1201.111. See also 5 C.F.R. section 1201.43.

Upon remand, the record should be supplemented with the secretary's records to which the appellant has referred throughout the proceedings and the "housing contract and brochure" which, according to the agency, set forth the procedures. Any other documents which explain the office procedures as of December 4, 1978 should also be submitted. After supplementation of the record, the presiding official shall issue a new initial decision.

Accordingly, this initial decision is hereby RESCINDED and the case is REMANDED for further proceedings consistent with this Opinion.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONNIE D. MCLEMORE
v.
DEPARTMENT OF THE INTERIOR

Docket No.
SL075299005

OPINION AND ORDER

The petition of July 9, 1979, requesting that the Board review the May 30, 1979 initial decision of the presiding official, is denied.

A copy of the initial decision reversing the action of the agency (petitioner) in changing the respondent to a lower grade position was sent by the presiding official of the Board's St. Louis Field Office to the agency's representative of record, the Area Personnel Officer, Bureau of Indian Affairs (BIA), Muskogee Area Office, Muskogee, Oklahoma. The decision stated that it would become final on July 2, 1979, unless a petition for review were filed by that date. The decision was received by the Area Personnel Officer on June 1. The July 9, 1979 petition for review, received by the Board on July 10, was submitted by the Acting Director of Personnel, Department of the Interior (DOI), Washington, D.C.

The petitioner contends, inter alia, that the BIA area office had forwarded the initial decision to the BIA central office, which received it on June 11, 1979, and that the central office did not receive the file and transcript of the hearing held by the presiding official until June 26, 1979. The petition presents no information explaining why the BIA central office did not receive the file and transcript until more than 2 weeks after it had received the initial decision. Similarly, it presents no explanation of the reason it was not filed until 2 weeks after BIA presumably had all of the materials it considered necessary to a determination as to whether to file a petition.

Title 5, U.S. Code, section 7701 (e) (1) (A) provides, in pertinent part, that a decision of a presiding official is a final decision unless:

> a party to the appeal or the Director petitions the Board for review within 30 days after the receipt of the decision. . . .

The Board published interim regulations to implement the law on January 19, 1979, 44 F.R. 3946 et seq. The interim regulations were in effect at the time the appeal was processed by the presiding official. They provided the following:

> **Section 1201.114 Filing of petition.**
>
> (a) Who may file: Any party to the proceeding or the Director of the Office of Personnel Management. The Director may request review of a case when he/she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule, or regulation under the jurisdiction of the Office.
>
> (b) Time limit for filing: A petition for review of the initial or final decision must be filed within 30 days of receipt of the decision.
>
> (c) Place of filing: Petitions for review shall be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. (20419).

At section 1201.21, they also stated:

> For purposes of this regulation, filing shall be interpreted to mean receipt of the document by the presiding official.

The instructions for submitting a petition for review provided by the presiding official in the initial decision were in accordance with these statutory and regulatory provisions.

One further regulatory provision which is applicable to the instant case is contained at section 1201.12 of the interim regulations:

> These rules may be suspended, revoked, amended, or waived in whole or in part by the Board on petition or on its own motion. Provided, however, that a presiding official may waive a rule, such as the time limit for filing for the purpose of an individual case for good cause shown.

Having reviewed the record now before us, we conclude that the petition for review was not filed in a timely manner and that the petitioner has failed to show good cause for the delay. The petitioner was clearly aware of the untimeliness of its petition, and as an explanation therefor, has stated only the information set forth above concerning the delays within the agency in getting the information about the case from the BIA area office to its central office, then to DOI central office. No direct attempt to show good cause was made, and we find no factual circumstances in the petition which constitute good cause.

As noted above, the Area Personnel Officer of BIA for the location at which the respondent works was the agency's representative before the field office. He responded to the petition for appeal after the presiding official forwarded a copy of it to the respondent's work installation at a different address, and it was he who represented the agency at the hearing. This representative was also named by the agency as the person to contact for information and case records within his jurisdiction when the Board sent out its Bulletin number 4 on April 9, 1979.

In that bulletin, the Chairwoman stressed that Congress, in passing the Civil Service Reform Act of 1978, expressed dissatisfaction with the processing delays that had occurred prior to the passage of the Act. She stated that delays in obtaining case files and other information from agencies, as well as delays caused by granting requests for postponements and time extensions, would no longer be accepted. Accordingly, she requested that each agency provide a list to the Board's field offices of the appropriate offices to contact in requesting files and other information. The bulletin ended with the following admonition:

> If an agency's failure to provide the addresses we have requested results in a delay in the receipt, by the proper agency office, of the field office's request for documents, the agency remains responsible for ensuring that the documents are provided with the deadline specified by the field office.

While the matters discussed in the bulletin are not the same as the delay at issue here, we find that the agency's designation of the Area Personnel Officer in response to the bulletin, his assumption of the role of agency representative, and the lack of any objection by DOI to his acting on its behalf before the field office indicates that he was the proper recipient of the decision for the agency. Further, DOI has not alleged in the petition that he was not, or that it had requested that the field office provide it, as well as its area office, with a copy. Under section 1201.31 of the regulations then in effect, the parties were required to designate their representative in writing. Whereas here, no specific designation is filed by the agency, we find that the presiding official proceeded properly in sending the initial decision to the Area Personnel Officer.

Under the circumstances, we find that the agency's internal delays in forwarding a copy of the initial decision, the case record, and the hearing transcript, between its field locations and its central office cannot be considered a showing of good cause for the delay in submission of the petition for review. Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board.

The agency is hereby ordered to submit to the presiding official, within 10 days of receipt of this decision, evidence of compliance with the corrective action directed in the initial decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HARRY P. MILLER
v.
FEDERAL DEPOSIT INSURANCE
CORPORATION

Docket No.
DA315H09006

OPINION AND ORDER

By letter dated December 22, 1979, Harry P. Miller, the petitioner, requested that the Board reopen the December 12, 1979 decision of the presiding official in his case because "due diligence in reviewing documents and testimony was not exercised by the Hearing Officer and Presiding Official."

Petitioner was employed by the respondent agency on September 25, 1978, and was separated from his position during the probationary period, effective August 17, 1979, allegedly due to unsatisfactory work performance. On appeal to the Board's Dallas Field Office petitioner alleged that his removal was due to partisan political reasons and resulted from a prohibited personnel practice. At his request, a hearing was held, and on December 12, 1979, the presiding official issued an initial decision in which he set forth the following findings: a termination during probation, while not normally within the scope of the Board's appellate purview, is an appealable action when it is alleged that it was taken because of partisan political affiliation; the agency's decision must be supported by a preponderance of the evidence in order to be sustained; the burden of proof on all affirmative defenses rests with the party who asserts the defense; the agency carried its burden by introducing evidence in the form of the appraisals of petitioner's work performance by several supervisors and examiners-in-charge; and petitioner failed to support his burden of showing that the termination was due to partisan political affiliations or a prohibited personnel practice (reprisal for disclosure of information to Congress).

A petition for review may be granted when the Board finds that either criterion set forth at 5 C.F.R. 1201.115 is met. Such a finding may be based on a determination that the petitioner has presented new and material evidence, or that he has made a showing that the initial decision represents a misinterpretation of law or regulation. In the instant case, the Board finds that such a showing has not been made. The petition for review takes issue with the findings of fact made by the presiding official, but fails to submit evidence meeting either criterion. Based on our review of the record, the Board finds that the evidence fully supports the conclusions of fact reached by the presiding official and that he accurately and properly assessed the burdens on each party in prosecuting the case before the Board.

Accordingly, we find that the criteria for review have not been met and the petition of December 22, 1979, as supplemented, is hereby DENIED.

This is the final decision of the Merit Systems Protection Board. The petitioner may seek judicial review of the Board's decision in an appropriate circuit of the U.S. Court of Appeals or the Court of Claims provided that such appeal is filed within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JERALD H. MILLER
v.
U.S. POSTAL SERVICE

Docket No.
DA035309006

OPINION AND ORDER

In an initial decision dated February 27, 1980, the presiding official in the Board's Dallas Field Office found that the appellant, Jerald H. Miller, was not entitled to restoration with the agency, the Postal Service, upon cessation of his disability compensation for a work-related injury, because the appellant had been removed from his position with the agency for cause. The appellant has petitioned for review of the presiding official's dismissal of his appeal for lack of standing.

Federal employees entitled to restoration to their former or equivalent positions under 5 U.S.C. 8151(b), upon recovery from a compensable work-related injury, include those who were ". . . separated or furloughed from a position without time limitation as a result of a compensable injury. . . ." 5 C.F.R. 353.103(c)(1). Thus, an employee who was removed for cause has no right to restoration simply because he or she received disability compensation subsequent to removal. The separation or furlough had to have resulted from the compensable injury alone in order for restoration rights to accrue.

As noted by the presiding official, the appellant's removal for failure to meet the attendance requirements of his position and absence without approved leave was affirmed through the agency's grievance-arbitration procedure. Moreover, a subsequent appeal to the Federal Employee Appeals Authority for denial of restoration rights upon the appellant's recovery from the same compensable injury (apparently there was a relapse between that appeal and this) terminated in affirmance of the agency's action, after reconsideration of the dismissal was denied by the Board's Office of Appeals. Since there is no question, therefore, that the appellant was removed for cause, we concur with the presiding official's conclusion that the appellant had no standing under 5 C.F.R. 353.401 to appeal the denial of a restoration right which he never possessed.

Accordingly, we REOPEN this appeal and AFFIRM the initial decision dated February 27, 1980.

The appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS A. POWERS
v.
DEPARTMENT OF AGRICULTURE

Docket No.
SF315H99007

ORDER

Appellant was terminated during his probationary period for post-appointment reasons. He did not allege that the termination was the result of discrimination because of partisan political reasons or marital status, and the presiding official dismissed the appeal on the basis that, in the absence of such allegations, the Board has no jurisdiction to entertain the appeal. Appellant then filed a petition for review.

The decision of the presiding official is correct. Probationers have no statutory right of appeal to the Board, and only limited regulatory rights of appeal. *Richard A. Drumgold* v. *Department of the Navy* 3 MSPB 89 (1980). Appellant's allegations with respect to the reasons for his dismissal are not sufficient to bring him within the reach of the regulatory appeal rights. Accordingly, the Petition for Review is DENIED. This is the final decision of the Merit Systems Protection Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS A. POWERS v. DEPARTMENT OF AGRICULTURE	Docket No. SF315H99007

ERRATA/AMENDMENT

The decision in the above captioned case, issued on September 30, 1980, is hereby amended to include the following notice:

The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this amendment to the Board's decision.

For the Board:

KATHY W. SEMONE
for ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 20, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM POWERS v. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE	Docket No. DC075209056

OPINION AND ORDER

William Powers, appellant, was removed from his position as Forensic Psychiatric Technician, GS-7, by the Department of Health, Education, and Welfare (now Department of Health and Human Services), respondent. The removal was based on the following allegations: (1) failure to follow procedures for requesting leave; (2) absences from duty post without permission; (3) and, discourteous and disrespectful behavior towards supervisor and co-workers. When taking the removal action, the agency also considered the appellant's disciplinary record which indicated that he had been reprimanded for use of profane language, and failure to request leave properly. In addition, he had been suspended for 30 days for not requesting leave, and unsatisfactory attendance.

The appellant appealed the agency action to the Board's Washington, D.C. Field Office. After a hearing was held, the presiding official found that the action was sustained by a preponderance of the evidence. After reciting the charges, the presiding official found that they were supported by a copy of appellant's leave record, notes which recorded appellant's arrivals and departures for the dates cited, and testimony concerning appellant's behavior at a meeting on April 4, 1979. It was also found that appellant did not contest the allegations.

Appellant petitioned the Board for review of the decision. He asserted that: the presiding official erroneously denied him an opportunity to present a material witness; the agency failed to refer him to counseling for a mental health problem; and his discharge resulted from bias against him by a supervisor, Ms. McMillan.

The witness whom the appellant attempted to present was Dr. John Kelly. It was requested that the doctor be allowed to testify concerning appellant's mental state. The appellant said the doctor could testify that he was under job related stress which affected his performance and actions. He testified that the doctor first treated him from May 7 to May 15, 1979. The presiding official ruled that the testimony was irrelevant, and denied the request.

After considering the facts of this case, we conclude that the failure to allow the witness to testify was improper.[1] We find the proffered testimony to be relevant to the case. Accordingly, the petition for review is GRANTED.

The testimony is relevant and material to at least some of the absences cited in the proposal letter. The appellant testified that the doctor had treated him from May 7 to May 15, 1979, but that due to continuing problems he could not work on May 17, 1979. He also testified that he had requested leave for May 2 to May 4, 1979, but that it was improperly denied. May 2 through May 4, and May 17, 1979 were cited in the proposal letter as dates the appellant was improperly absent, although the former dates apparently were not sustained by the agency. The treatment appellant received from May 5 to May 15, 1979, and his condition during this period, are logically of possible probative value concerning his absences around this time. Further, the doctor may be able to give testimony pertinent to other absences.

The doctor's testimony may also be probative of appellant's claim that the discharge was a result of discrimination towards him as a handicapped person. 5 U.S.C. 7702(a)(1)(B)(iii). Although not artfully phrased, the appellant raised this issue sufficiently to warrant consideration. He stated that he wanted the doctor to testify as to his mental health, and alleged that the offenses charged may have resulted from his condition. He testified that his supervisors were aware of his condition, but that his requests for sick leave were disapproved because he did not talk to Ms. McMillan, even though his immediate supervisor ostensibly had the authority to approve leave.

This testimony is corroborated by the deletion of the May 2-May 4 dates from the agency's final decision. The reason for the deletion was not clear, since the final decision letter stated that although appellant called in sick, he failed to call Ms. McMillan—implying that this was a requirement. Thus, it appears appellant may have had an additional requirement for requesting leave that other employees did not have.[2] While this may go to the merits of the absences, it may, in combination with the doctor's testimony, also establish that appellant had an added requirement imposed upon him as a result of health problems.

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[1] A presiding official has the authority to rule upon offers of proof and receive relevant evidence. 5 C.F.R. 1201.41(b)(3).

[2] This however is not clear from the record. McMillan testified that appellant would normally request leave from the head nurse, and that McMillan would only approve leave in her absence. This testimony is contradicted by the final decision letter and McMillan's later testimony that other leave approving officials referred his leave requests to her because he was on leave review. The leave review status of appellant was emphasized, but its effect on procedures to be followed by him was never defined.

If appellant can establish that the agency was guilty of a prohibited personnel practice by terminating him for reasons of discrimination prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791),[3] then the decision cannot be sustained, 5 U.S.C. 7701(c) (2) (B). The doctor's testimony is relevant to this issue.

We have not here decided whether appellant was a handicapped individual as defined in 29 C.F.R. 1613.702, or whether, if handicapped, he was given reasonable accommodation as required by 29 C.F.R. 1613.704. These issues were not adequately developed at the initial hearing, and a remand is therefore necessary.

We further note that upon remand the presiding official should consider the evidence in the case more carefully. For instance, the appellant did contest some of the charges, contrary to the statement in the initial decision, and the agency did not sustain all of the reasons in the advance notice. Nor does the evidence clearly define the procedures appellant was supposed to follow when requesting leave. Since it is alleged that he failed to follow certain procedures, those procedures must be clearly ascertained. Notably, the contradictory evidence concerning leave approval makes it impossible to judge the case adequately and fairly.

Accordingly, the initial decision of the presiding official is VACATED and the case is REMANDED for further proceedings consistent with this opinion.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

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[3] This is a prohibited personnel practice as defined in 5 U.S.C. 2302 (b) (1) (D).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM H. RUSSO
v.
VETERANS ADMINISTRATION

Docket No.
AT075209031

OPINION AND ORDER

William H. Russo petitioned the Atlanta Field Office of the Merit Systems Protection Board for appeal of his removal as a Nursing Assistant, GS-5, with the Veterans Administration Hospital, Tampa, Florida, based on a charge of patient abuse. The agency founded the charge on its determination that the appellant had cursed, threatened, and pushed a patient during an argument in the patients' dayroom initiated by the appellant's insistence on changing the television channel to watch a basketball game. The appellant alleged that the agency committed harmful error in failing to permit him to confront his accuser during a pretermination hearing; that the agency's removal action was discriminatory because it was partially based on his physical handicap (hearing impairment); that the agency's charge was not supported by the preponderance of the evidence; and that the appellant was the subject of disparate treatment in the imposition of administrative penalties.

In an initial decision issued on November 2, 1979, the presiding official sustained the agency's removal action as promoting the efficiency of the service. The presiding official found that the agency supported its action by the preponderance of the evidence and that the appellant failed to establish harmful procedural error, discrimination, or other disparate treatment on the agency's part. The presiding official found, further, that the penalty of removal was not too severe in view of the fact that the appellant had been counseled three times prior to the incident of abuse at issue regarding his overt hostility to patients, bordering on abuse.

The appellant has now petitioned for review of the initial decision based on allegedly new and material evidence. In the petition, the appellant has asserted the existence of evidence relating to the appellant's disparate treatment allegation, which was not available when the record was closed, despite due diligence.

The appellant had argued before the presiding official that he was treated differently from other agency employees because the agency representative proposing his removal was biased against retired military personnel who were "double-dippers," like the appellant. He had introduced evidence establishing that another agency employee, who had a sexual encounter with a mental patient on leave from the hospital, had been transferred rather than removed from his position. The presiding official found that the appellant made no affirmative showing of bias in light of the fact that 18-20 similarly retired military personnel were still employed by the agency. The presiding official found, further, that the incident involving another employee's sexual encounter with a patient on leave may well have warranted disparate treatment from the incident of the appellant's verbal and physical abuse of a patient, considering that the former took place off hospital grounds while the employee was off-duty and the patient was beyond the supervision of the hospital.

In his petition for review, the appellant asserted that on the day before the appellant's hearing another nursing assistant with the agency verbally and physically abused a patient, but was only reprimanded. The appellant contended, further, that an agency witness at the hearing on appeal lacked credibility and was likewise culpable of abuse because a few months after proposing the appellant's removal she herself had lost control and verbally attacked a doctor in front of patients regarding the release of a particular patient. Finally, the appellant requested that the Board subpoena the agency's records concerning these two incidents.

In its response to the petition, the agency sought to distinguish both incidents raised by the appellant from the incident involving the appellant. The agency noted that although a patient had complained of abuse by another nursing assistant, the agency's investigation did not substantiate bringing a charge against the employee. The agency argued, further, that the incident between the agency witness and a doctor, who were both agency employees, was irrelevant to the appellant's removal.

As specified by the presiding official in his initial decision, the Board's regulations provide at 5 C.F.R. 1201.115 that the Board may grant a petition for review when it is established that:

> (a) New and material evidence is available that, despite due diligence, was not available when the record was closed, or
>
> (b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Since the appellant's allegations in his petition for review relate only to the former criterion, the Board shall determine whether that requirement has been met.

There is no question whether the two evidentiary submissions are in fact "new" in that they relate to events which could not reasonably have been raised before the presiding official. We will, therefore, concentrate on whether they are both "material," with reference to similar materiality requirements regarding new evidence warranting the reconsideration of the adjudicatory decisions of other administrative bodies as interpreted by the courts.

Section 10(e) of the National Labor Relations Act provides that, when the National Labor Relations Board (NLRB) petitions a U.S. Court of Appeals for an enforcement order, either party to the earlier proceedings before the NLRB may be granted leave to adduce additional evidence upon a showing ". . . that such additional evidence is *material* and that there were reasonable grounds for the failure to adduce such evidence in the (prior) hearing. . . ." 29 U.S.C. 160(e) (emphasis added). This materiality requirement has been interpreted in *National Labor Relations Board v. Serv-Air, Inc.*, 431 F.2d 572, 575 (10th Cir. 1970), to be a "sufficient" degree of materiality.

The regulations of the Department of Health and Human Services' Social Security Administration provide for the reconsideration of an administrative determination where "(n)ew and material evidence is furnished after notice to the party to the initial determination." 20 C.F.R. 404.957 and 404.958. This regulatory provision has been judicially construed in *Leviner v. Richardson*, 443 F.2d 1338, 1343 (4th Cir. 1971), as requiring the reopening of administrative proceedings ". . . where new and material evidence is offered which is of sufficient weight that it may result in a different determination."

Finally, in *Chandler v. Johnson*, 515 F.2d 251 (9th Cir. 1975), *reversed on other grounds*, 425 U.S. 840 (1976), the court refused to reopen the record to permit the taking of more testimony in a proceeding before the Adjudication Division of the Veterans Administration, whose decision was affirmed by the former Civil Service Commission's Board of Appeals and Review. The court noted that ". . . there was no offer of proof or suggestion that new and material evidence likely to produce a different result would be forthcoming if the record were reopened." *Id.* at 255.

Consistent with these court decisions under closely analogous circumstances, the Board concludes that in order to satisfy the "new and material evidence" criterion for granting a petition for review, the new evidentiary submission must be of sufficient weight to warrant an outcome different from that ordered by the presiding official. The two new evidentiary submissions of the appellant shall, therefore, be examined in light of this requirement.

The first submission relates to another alleged incident of physical and verbal abuse by a nursing assistant where the employee was simply reprimanded, not removed like the appellant. The record on appeal contains a 1978 policy announcement of the agency's chief medical director, clearly stating that the administrative penalty for patient abuse is removal and that a lesser penalty may be imposed ". . . only when the abuse is considered to be of a minor nature and is not a repeated offense, or where there are mitigating or extenuating circumstances." The appellant was removed in accordance with this policy. His act of abuse was found by the agency and by the presiding official to be serious and to constitute a repeated offense in light of earlier warnings by the appellant's supervisor; no mitigating circumstances were found. In contrast, the incident involving another nursing assistant's alleged patient abuse could not be substantiated to the extent that the agency believed it could level a charge.

We find that the two incidents are so different that their comparison does not tend to establish the appellant's disparate treatment. The Board concludes, therefore, that evidence regarding the alleged incident of patient abuse by another agency employee would not be of sufficient weight to warrant a finding different from that in the initial decision.

As stated in the petition for review, the second new evidentiary submission relates to the alleged "lack of credibility" of the agency witness who proposed the appellant's removal. That evidence concerns an incident between two employees which has no bearing on disparate penalties imposed in cases of patient abuse. The Board finds that, since this evidence would merely tend to impeach the agency witness's testimony, which was corroborated by the testimony of others, it does not satisfy the materiality requirement for granting a petition for review.

Accordingly, the petition for review of the initial decision dated November 2, 1979, is DENIED.

This is the final decision of the Merit Systems Protection Board. The appellant has the right to petition the Equal Employment Opportunity Commission to consider the Board's final decision on the issue of discrimination. Such petition must be filed in writing with the Office of Review and Appeals, Equal Employment Opportunity Commission, 2401 E Street, N.W., Washington, D.C. 20506. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. District Court must be filed no later than thirty days after the appellant's receipt of the final decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of a final Board decision must be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than thirty days after receipt of notice of the Board's final decision.

For the Board:

Ersa H. Poston.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOROTHY H. SMITH v. VETERANS ADMINISTRATION	Docket No. DA075299033

OPINION AND ORDER

By Order of the Merit Systems Protection Board dated January 18, 1980, this appeal was reopened to address the issue of when an award of attorney fees is "warranted in the interest of justice" under 5 U.S.C. 7701(g)(1). Briefs were submitted by both parties and by the Office of Personnel Management as intervenor. Since that general issue has now been resolved in *Allen v. U.S. Postal Service,* 2 MSPB 582 (1980), we shall address the specific issue of whether fees were properly denied in this appeal.

The agency removed the appellant from her position as a Medical Radiology Technician/Diagnosis based on six charges: two instances of disobeying supervisors' instructions (not to contact physicians at their homes while she was off duty regarding personal matters); slanderous statements to fellow employees; threatening remarks to a fellow employee; rude behavior as a representative of the agency in connection with arranging for a catered party; and insulting and abusive statements about a fellow employee. The agency decided not to present the testimony of its proposed witnesses at the hearing on appeal to the Board's Dallas Field Office, electing to rely upon the written documentation of its charges in the record.

In his initial decision, the presiding official reversed the agency's removal action, finding that only one of the six charges (insulting and abusive statements about a fellow employee) was proved by the preponderance of the evidence, and that removal based on that charge alone would not promote the efficiency of the service. He noted, however, that if all of the charges had been proved, they could have justified removal. Initial Decision at 10.

In his addendum decision on the subsequent motion for attorney fees, the presiding official concluded, after ". . . close scrutiny of the circumstances and facts involved in the adverse action and the reversal decision," that an award of fees was not warranted in the interest of justice. Addendum Decision at 2. He considered that there were no allegations or evidence of a prohibited personnel practice. In addition, although he had found that only one of the six agency charges was proved by the prepondance of the evidence, the presiding official noted that there was substantial evidence in the record supporting all of the charges. The motion for fees was, therefore, denied.

We concur with this decision of the presiding official. Even in light of the guidelines set forth in *Allen, supra*, at 593, there appears to be no basis for an award of attorney fees "in the interest of justice." From the record on appeal, it is evident that the agency's action was not without merit, the appellant was not "substantially innocent" of the charges leveled, the agency exhibited no bad faith in initiating the action, there were no apparent procedural errors, and no other justification for an award was raised in the briefs of the parties or the intervenor.

Accordingly, the denial of the motion for an award of attorney fees is hereby AFFIRMED.

This is the final decision of the Merit Systems Protection Board in this appeal. The appellant is advised of her right to appeal this decision to the United States Court of Claims, or to the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision by the Board.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Donald R. Stemmer
v.
Department of the Army

Docket No.
PH075299047

Opinion and Order

A petition dated August 28, 1979, was filed by Donald R. Stemmer for review of the initial decision by the presiding official of the Philadelphia Field Office of the Merit Systems Protection Board dismissing his appeal as untimely filed.

FACTUAL BACKGROUND

By letter dated March 29, 1979, petitioner was officially informed by the Real Estate Division of the Corps of Engineers, Department of the Army, of a proposed removal action. Petitioner responded in detail, and on May 1, 1979, the agency notified him that he would be separated effective May 11, 1979.

Petitioner filed an appeal received in the Philadelphia Field Office of the Board on June 14, 1979. On appeal he requested a hearing and sought reversal of the decision to separate, and reinstatement. Petitioner further requested an extension of time for filing the appeal on the ground that he was on active military duty until May 18, 1979. The petition was later amended to include a charge of discrimination.

The agency opposed petitioner's request for extension and filed a motion to dismiss the appeal as untimely filed. In his decision dated July 25, 1979, the presiding official determined that petitioner had shown good cause for an extension and granted a 7-day extension, running from May 12 through May 18, 1979, the period during which petitioner was on active military duty, and found that the 20-day time limitation for filing the appeal under 5 C.F.R. 1201.22(b) commenced to run on May 19, 1979, and expired on June 7, 1979. He further found, pursuant to interim regulation 5 C.F.R. 1201.21 then in effect, which provided that "filing shall be interpreted to mean receipt of the document by the presiding official," that the date of receipt of the appeal by the Field Office, June 14, 1979, was the date of filing. However, finding that petitioner failed to show good cause why he should be granted additional time beyond the 20-day regulatory time period, he dismissed the appeal as untimely filed.

This petition for review is based in part upon the claim that the presiding official erred in his interpretation of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 50 U.S.C. App. 501 et seq., (Pub. L. No. 76-861, 54 Stat. 1178 (1940), as amended, Pub. L. No. 92-540, 86 Stat. 1098 (1942)).

ISSUE

The pertinent issue presented on review is whether the Soldiers' and Sailors' Civil Relief Act confers upon petitioner the right to additional time beyond the 7-day extension and the 20-day regulatory appeal time limitation granted him after his completion of active military duty.

DISCUSSION

Petitioner relies particularly upon 50 U.S.C. App. 521 which he claims "grant(s) a veteran additional time, after military service, to exercise his rights" in legal proceedings. That section provides:

> At any stage thereof any action or proceeding in any *court* in which a person in military service is involved either as a plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the *court* in which it is pending, on its own motion, and shall, on application to it by such person or some person in his behalf, be stayed as provided in this Act (sections 501-548 and 560-590 of this Appendix), unless in the opinion of the *court*, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service. (Emphasis ours).

The hereinabove cited provision specifically refers to "court" proceedings. This section has been held not to apply to administrative proceedings. *Polis v. Creedon*, 162 F.2d 908 (Emer. Ct. App. 1947). The court in that case relied upon the definition of "court" in 50 U.S.C. App. 511(4) as including "any court of competent jurisdiction of the United States or of any State, whether or not a court of record." 162 F.2d at 911. The holding in *Polis* was followed in *United States v. Frantz*, 220 F.2d 123 (3rd Cir.), *cert. denied*, 349 U.S. 954 (1955).

The authority most supportive of petitioner's position is 5 U.S.C. App. 525, quoted in the decision of the presiding official and repeated here in relevant part as follows:

> The period of military service shall not be included in computing any period now or hereafter to be limited by any law, regulation, or order for the bringing of any action or proceeding in any court, board, bureau, commission, depart-

> ment, or other agency of government by . . . any person in military service . . . whether such cause of action or the right or privilege to institute such action or proceeding shall have accrued prior to or during the period of such service. . . . (Initial Decision No. PH075299047 (July 25, 1979), at 2).

Section 525 operates to toll the statute of limitations only for the period of active military service. *Diamond v. United States*, 344 F.2d 703 (Ct. Cl. 1965). In the instant matter, section 525 operated automatically to halt the running of the 20-day time limitation for filing the appeal until petitioner was released from active duty, i.e., until May 18, 1979. It does not operate to grant petitioner more time than is required for filing by 5 C.F.R. 1201.22(b).

CONCLUSION

Petitioner was afforded ample opportunity to show good cause justifying an extension of time for filing an appeal, in a July 5, 1979 response to the agency's objection to his request for extension, and again in a July 17, 1979 communication to the Board which he termed a "supplemental response to the Agency's Motion to Dismiss Appeal as Untimely." However, the only reason petitioner presented in support of his request for an extension was the fact that he was on active military duty until May 18, 1979. Therefore, under the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 525, petitioner was entitled only to a mandatory tolling of the 20-day time limitation here involved during the period of his service. The Act provided for no further extensions of time.

We concur with the finding of the presiding official that the period for filing under 5 C.F.R. 1201.22(b) began to run from May 19, 1979, the day after petitioner was released from active duty, and continued to run until June 7, 1979. In order for petitioner to have received an extension beyond June 7, 1979, it was necessary for him to show "good cause" pursuant to 5 C.F.R. 1201.12. Since petitioner advanced no reason why the May 19, 1979 to June 7, 1979 time period was inadequate for the filing of his appeal, he was entitled to no further extensions of time.

Based on this finding, we do not consider other issues on the merits as raised by petitioner.

Accordingly, the petition for review is hereby DENIED.

This is a final decision of the Merit Systems Protection Board. Petitioner is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed *within 30 calendar days of receipt of this decision.*

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERTA L. STEVENSON
v.
U.S. DEPARTMENT OF THE
TREASURY

Docket No.
SL531D09003

OPINION AND ORDER

Roberta L. Stevenson, appellant, was denied a within-grade salary increase by the Department of the Treasury. The negative reconsideration decision was dated September 5, 1979. Patrick Smith, appellant's attorney, filed an appeal of the denial by regular mail; the letter was postmarked September 25, 1979 and received September 28, 1979 by the Board's St. Louis Field Office.

In the letter, appellant's intention to appeal the decision was announced. Mr. Smith wrote, in pertinent part:

> "I intend to appeal this decision on substantive and procedural grounds. A more detailed explanation will follow along with the evidence file."

The Field Office sent a copy of the petition to the agency on October 1, 1979, along with a request for information about the case. Appellant's attorney received a copy of the letter, as well as a letter with procedural information. In the letter Mr. Smith was instructed to complete and return the "Designation of Appellant's Representative" form within ten days, and he was informed that failure to prosecute the appeal expeditiously might result in dismissal.

The only response to these letters was the submission of the requested documents by the agency on October 18, 1979. The agency designated its representative, who raised the issue of the timeliness of the appeal and noted the agency could not properly respond since there was no statement explaining the bases of the appeal.

On October 22, 1979, the Field Office again requested Mr. Smith to return the designation form, and said that the agency's submissions would not be forwarded until this was done. The designation of representative form was received by the Field Office on November 6, 1979, and on that day the agency's submissions were forwarded to appellant's representative with instructions that the record would close on November 23, 1979.

The agency's representative filed a brief on November 23, 1979. In addition to other matters, it was emphasized that the reasons for the appeal still had not been submitted. A copy of this submission was sent to appellant's representative on November 26. Appellant's representative submitted nothing further. The presiding official held that the appeal was not timely filed, and he dismissed the case.

Appellant's representative petitioned the Board, and argued that the decision should be reversed because he had been misinformed by an official of the Board as to the requirements for filing a timely appeal. We need not consider this allegation since we conclude that the appeal was timely.

The appeal letter was postmarked September 25, 1979, the last day on which an appeal could be timely filed. The presiding official concluded, however, that since the letter was not sent by certified mail, and since the letter was not received until September 28, the appeal was not timely.

Although this conclusion has some support in 5 C.F.R. 1201.22, we recently held to the contrary. In *Beer v. Department of the Army,* 2 MSPB 226 (1980), we held that the postmark date is the effective filing date. Thus, even if an appellant files an appeal by regular mail, the postmark date will be the filing date.

Since the decision in this case was based on an erroneous interpretation of 5 C.F.R. 1201.22, the petition for review is GRANTED. In the interest of prompt and fair resolution of this petition, the Board will consider this case further. The Board, pursuant to 5 C.F.R. 1201.116, may take any action necessary for final disposition of a case when a petition for review is granted.

5 C.F.R. 1201.24 requires an appellant or representative to state the reasons the appellant believes an agency action is wrong when appealing the action. Appellant's representative did not do that when the appeal was filed. Despite several letters from the presiding official, two submissions from the agency, and knowledge that the record would be closed, the appellant's representative never gave a statement of the grounds for the appeal. A hearing was never requested, and there was no response to the agency's submissions. Accordingly, we conclude that the appeal should be DISMISSED with prejudice, due to the failure of appellant's representative to prosecute the case. 5 C.F.R. 1201.43(b); *Bennett v. Department of the Navy,* 2 MSPB 93 (1980).

Accordingly, dismissal of the appeal due to untimely filing is REVERSED. The case is DISMISSED due to the failure of appellant's representative to prosecute the case.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the

appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KEITH H. STOUT
v.
U.S. POSTAL SERVICE

Docket No.
DA075209010

OPINION AND ORDER

The issue before the Board in this appeal is whether attorney fees were properly awarded against the U.S. Postal Service by the Board's Dallas Field Office upon reversing the demotion of Keith H. Stout. The Postal Service has petitioned for review of the award, and the Office of Personnel Management has intervened, each urging that the presiding official errer in awarding fees on the basis that the demotion was "groundless and therefore meritless."

Mr. Stout, the appellant, was reduced in grade by the U.S. Postal Service, the agency, from the position of Director, Plant Maintenance (EAS-23), Bulk Mail Center, to that of Foreman, Maintenance MPE (PMS-16), Main Post Office, both located in Dallas, Texas. The action was based on two charges: failure to perform the duties of the position; and failure to provide proper guidance to subordinates. In an initial decision on the appeal, which has since become final, the presiding official found that the preponderance of the evidence[1] did not support the charges against the appellant.[2]

The first charge involved allegations of improper inventory controls, improper completion and evaluation of work orders, unsatisfactory maintenance of capital property inventory records, and failure to control access to the agency's tool and parts room. The presiding official noted that these allegations were based on an agency audit of the Dallas Bulk Mail Center, Initial Decision at 8, but he concluded that the preponderance of the evidence lay with the appellant, *id.* at 14.

The second charge involved allegations of failure to provide proper guidance for two subordinate supervisors. The presiding official noted that this charge was based on an investigative memorandum concerning grievance complaints of supervisors' forging initials on preventative maintenance work orders. *Id.* at 7. After considering the testimony of the witnesses on this charge, he concluded that it was not supported by the preponderance of the evidence, especially since there was another level of subordinate supervisors between the appellant and the two supervisors in question. *Id.* at 15-17.

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[1] This standard of proof was applied by the presiding official after he concluded that 5 U.S.C. 4303 does not apply to the Postal Service. Initial Decision at 2. *See Wells v. Harris,* 1 MSPB 199, 235 (1980).

[2] The appellant raised a number of affirmative defenses, but they were found unsubstantiated and they have no direct bearing on the issue raised in the petition for review.

In an addendum decision, the presiding official granted the appellant's subsequent motion for an award of $4,660.00 in attorney fees and $240.66 in related expenses. Before making the award, he considered whether the award was "warranted in the interest of justice," as required by 5 U.S.C. 7701(g)(1) and 5 C.F.R. 1201.37(a), because the agency's action was "clearly without merit," *id.* The presiding official analogized that standard to the "meritless" standard under the antidiscrimination laws, 42 U.S.C. 2000e-5(k), and to the Supreme Court's definition of "meritless" in *Christianburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 411, 421 (1978), as "groundless" or "without foundation." He then undertook an analysis of the circumstances of this appeal.

The presiding official noted that the charges were based on an agency investigation and audit containing statements and conclusions not further examined by the agency official who proposed the appellant's demotion, and that the charges did not specify how the appellant was responsible for the alleged deficiencies. He noted, further, that the agency submitted only the testimony of the proposing official in support of its allegations of performance deficiencies. Referring to his initial decision, the presiding official concluded that he ". . . found the evidence and testimony to be persuasive that the agency's action was groundless and therefore meritless." Addendum Decision at 3.

We agree that an award of attorney fees is warranted in the interest of justice in this case because the agency's demotion action was "clearly without merit" in that the deciding official knew or should have known that the agency could not prevail on the merits. 5 U.S.C. 7701(g)(1); *Allen v. U.S. Postal Service*, 2 MSPB 582, 593 (1980). The charges against the appellant were based on investigative reports that did not directly attribute the administrative shortcomings to the appellant. Initial Decision at 7-8. In his written response to the notice of proposed demotion, which is part of the record on appeal, the appellant refuted the charges on the same basis that the presiding official found they were unsupported by the preponderance of the evidence. Initial Decision at 8-17. Our review of the initial decision leads us to conclude that, if the deciding agency official had properly considered the appellant's response and investigated any questions it provoked in his mind, he should have known that he could not succeed in a demotion action against the appellant.

Despite this conclusion, we find the addendum decision awarding fees to be erroneous in equating the "clearly without merit" standard of 5 U.S.C. 7701(g)(1) with the "meritless" standard under Title VII of the Civil Rights Act of 1964 and *Christianburg Garment Co.* The latter standard for the award of attorney fees to defendants in discrimination suits is especially strict so as to encourage plaintiffs to bring suit to redress unlawful discrimination unless legal merit is altogether lacking. *See Christianburg Garment Co.,* 434 U.S. at 421-22. The former standard, on the other hand, calls for the exercise of responsible judgment on the part of the deciding agency official to determine whether the charges leveled are supportable and whether the action proposed promotes the efficiency of the service. 5 U.S.C. 7513(a) and 7701(c).

The addendum decision is lacking, moreover, in that it contains no specific findings with regard to the reasonableness of the attorney fees claimed. *See Kling v. Department of Justice,* 2 MSPB 620, 624 (1980).

Accordingly, the petition to review the award of attorney fees in the addendum decision dated January 31, 1980, is hereby GRANTED, that decision is VACATED, and this appeal is REMANDED to the Dallas Field Office for issuance of an award of attorney fees in such amount as is reasonable under the circumstances of this case.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EMMANUEL TORRES
v.
U.S. DEPARTMENT OF JUSTICE

Docket No.
BN315809003

OPINION AND ORDER

The appellant filed an appeal with the Boston Field Office of the Board on September 17, 1979, from the action of the U.S. Department of Justice, Federal Correctional Institution, Danbury, Connecticut which terminated his services for absence without leave.

Since the petition for appeal to the Field Office did not contain enough information for it to proceed, the Field Office requested additional information which when received identified the petitioner as a probationary employee with only 5 days of Federal service.

The Field Office then addressed a letter to the appellant notifying him of and explaining the limits of the Board's appellate jurisdiction in the case of an employee terminated during his probationary period and enclosed a copy of 5 C.F.R. 315.806 (1979), with reference to his appeal rights to the Board.

The presiding official in his initial decision issued on October 26, 1979, found that while the appellant had referred to his Hispanic origin and to due process, these points raised were beyond the authorized scope of the Field Office's review and that absent a claim that the separation was for prohibited partisan political reasons or because of marital status, the appeal did not fall within the purview of the Board's appellate jurisdiction. The presiding official also found that the reference to Hispanic origin should be considered under the complaint procedures of the Federal Government's Equal Employment Opportunity Program.

The appellant, in his petition for review, recounts the circumstances of his termination.

5 U.S.C. 7511 sets forth statutory rights of appeal for employees who have been removed from Federal employment. Excluded from coverage are employees "serving a probationary or trial period under an initial appointment." *See* 5 U.S.C. 7511(a)(1)(A). Certain regulatory appeal rights to the Board may also be provided by the Office of Personnel Management (OPM) under 5 U.S.C. 1205(a)(1). *See also* 5 C.F.R. 1201.3(a) (1979). OPM's

regulations provide at 5 C.F.R. 315.806(b) (1979) that probationary employees may appeal probationary discharges based upon partisan political or marital status considerations. The appellant has not made such allegations and, thus, has neither a statutory nor regulatory right of appeal.

Accordingly, the petition for review is DENIED. This is the final decision of the Merit Systems Protection Board on this case. The appellant is hereby notified of his right to file a civil action in the Court of Claims or the United States Court of Appeals for the appropriate circuit within 30 days of the receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DAVID R. VICK v. DEPARTMENT OF THE NAVY	Docket No. SF075209007

OPINION AND ORDER

The appellant, formerly an Electric Power Controller, was separated by the Mare Island Naval Shipyard for endangering the safety of a ship in dry dock by failing to properly execute operational procedures regarding dock drainage valves. Upon appeal to the Board's San Francisco Field Office, the presiding official, finding the charges to be supported by a preponderance of the evidence, sustained the agency's action and affirmed appellant's removal.

In his petition for review of the initial decision, the appellant argued that he was innocent and that a witness, who testified at the hearing, opened the valves. Appellant contended that there was no way to recall this witness since he had been dismissed and the hearing officer was pushing for time.

Upon review of the initial decision and of the record, we find no basis upon which the initial decision may be reopened. The appellant has not demonstrated in his petition for review that his request meets the criteria contained in 5 C.F.R. 1201.115. The appellant's counsel examined the aforementioned witness, but made no attempt to recall him after he testified. Under the circumstances, the Board finds that the presiding official conducted the hearing in an appropriate manner. Further, we find that the petition fails to show error by the presiding official in exercising the authority provided him under 5 C.F.R. 1201.41.

In maintaining his innocence, appellant has merely stated his disagreement with the presiding official's conclusions. Appellant has pointed to nothing in the record that could explain why his testimony should be assessed as more credible than that of others who testified. Appellant has identified no evidence and given the Board no reason tending to show that the presiding official's credibility determination was in error.

In view of the above and the deference due the presiding official's opportunity to observe the demeanor and hear the testimony of witnesses, see *Weaver v. Department of the Navy*, 2 MSPB 297 (1980), we find no basis that could warrant reversal of the presiding official's determination.

We reviewed the evidence relating to the charges concerning the dock drainage valves which endangered the safety of a ship in dry dock and find that they are sustained by the preponderance of the evidence, which is the proper degree of proof under 5 U.S.C. 7701 (c) (1) (B) and 5 C.F.R. 1201.56 (c) (2). Appellant has raised no matters warranting review by the Board. Accordingly, the petition for review is hereby DENIED.

This is the final decision of the Merit Systems Protection Board.

Appellant is hereby advised of his right to appeal this decision to the appropriate circuit of the U.S. Court of Appeals or the U.S. Court of Claims within thirty (30) days from receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Maggie J. Wilkins
v.
Department of the Air Force

Docket No.
AT075299028

Opinion and Order

Appellant was removed from her position for abusive language and threatening to do bodily harm to her supervisor. The initial decision of the presiding official found the charge to be supported by a preponderance of the evidence and the removal action for such cause as to promote the efficiency of the service. Appellant has petitioned for review alleging unjust treatment.

The Board's regulations at 5 C.F.R. 1201.115 (1979) prescribe, pursuant to 5 U.S.C. 7701(c)(1), the requirements of a petition for review. The appellant's petition arguably may be taken to allege that the agency action should not be affirmed and that the presiding official misinterpreted the law (i.e., 5 U.S.C. 7701(c)(2)). Appellant, however, has failed to show any harmful procedural error, or prohibited personnel practice, or other action not in accordance with any law, or error by the presiding official. The record reflects that the appellant was given a full and fair opportunity to present evidence and argument with her appeal and at the hearing held on the matter. The initial decision is based on the evidence developed by the parties. The Board finds no error by the presiding official which would require a change in the initial decision.

Having failed to establish any of the above, the appellant's petition for review is accordingly, DENIED.

This is a final decision of the Merit Systems Protection Board. The appellant is notified of her right to file a petition for judicial review of this decision in the appropriate circuit of the United States Court of Appeals, or the United States Court of Claims within 30 days of the receipt of this decision.

For the Board:

Robert E. Taylor,
Secretary.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ISRAEL ZIDELE	
v.	Docket No.
DEFENSE CONTRACT ADMINISTRATION SERVICES REGION	NY075299022

OPINION AND ORDER

The petition for review filed by appellant, Israel Zidele, alleged that "new material" is available for review by the Board. The new material is an allegation that petitioner's supervisor attacked another employee on June 29, 1979. The Board finds that the evidence submitted does not constitute material evidence, since it is not relevant to a fact which is directly in dispute in this appeal, *United States v. DeLucia*, 256 F.2d 487, *cert. denied* 358 U.S. 836 (1958). Rather, it is relevant only to an element of petitioner's past record, which is not subject to adjudication during the course of this appeal. It is not probative of the charge which formed the basis for the instant adverse action, that petitioner threatened a fellow employee, and with which that supervisor had no involvement.

Further, the Board finds no evidence of material omissions from the transcript of the hearing which had a substantial adverse effect on petitioner's rights. See 44 Fed. Reg. 3946, *et seq.* (1979), 5 C.F.R. Sections 1201.54 and 1201.112 of the interim regulations of the Board. The alleged omissions from the transcript of the hearing, to which the petition refers, appear to be only off-the-record discussions which were summarized on the record, and to which petitioner's representative had an opportunity to object.

Finally, the Board concludes that the remaining allegations of the petition for review constitute an attack on the determinations of credibility and findings of fact made by the presiding official, and that such allegations do not meet the criteria for review enumerated in Section 1201.113 of the interim regulations. The presiding official properly applied the correct evidentiary standard to the agency's proof, and petitioner has submitted insufficient evidence to show error in the decision so as to warrant a reconsideration of it. See *Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

Accordingly, the petition for review is DENIED. This is the final decision of the Merit Systems Protection Board on this case.

The petitioner is hereby notified of his right to file a civil action in an appropriate circuit of the United States Court of Appeals or the Court of Claims within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *September 30, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM W. ALTMAN, JR.
v.
DEPARTMENT OF THE TREASURY

Docket No.
AT531D09002

OPINION AND ORDER

Appellant, by his counsel, timely filed a petition for appeal with the Board's Atlanta Field Office from the March 12, 1979 reconsideration decision of the Department of the Treasury, Internal Revenue Service, Columbia, South Carolina, sustaining its prior determination that appellant was not performing at an acceptable level of competence (ALOC) for purposes of receiving his periodic within-grade salary increase as a Special Agent, GS-13. The agency's negative ALOC determination was based on appellant's alleged deficiencies in report writing, time utilization, investigative techniques and independence from supervision.

By initial decision dated November 30, 1979, the presiding official found on the testimony presented by the agency and the approval of appellant's application for disability retirement that appellant was not performing at an acceptable level of competence for purposes of receiving his within-grade salary increase. The presiding official, therefore, sustained the agency's negative ALOC determination.[1]

Appellant *pro se* filed a request with this Board dated December 31, 1979, for an extension of thirty days in which to file a petition for review, in order to discuss his appeal with new counsel. Pursuant to 5 C.F.R. 1201.113(d), the Board granted an extension of time to January 31, 1980, for filing the petition for review. However, no petition for review or other communication has been received by the Board in connection with the appeal. Nor does appellant's request for extension establish that new and material evidence is available that, despite due diligence, was not available when the record was closed, or that the decision of the presiding official is based on an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115.

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[1] The presiding official did not articulate the standard of proof he applied in sustaining the agency action. We find, however, that the agency's action was supported by substantial evidence as required by 5 U.S.C. 7701(c)(1)(A). *See Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980).

Appellant has failed to prosecute his appeal by timely complying with our grant of an extension to file his petition for review.

Accordingly, the appeal is DISMISSED for want of prosecution by appellant.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALVIN B. BONNER
v.
U.S. POSTAL SERVICE

Docket No.
SF075299029

OPINION AND ORDER

Appellant filed an appeal with the San Francisco Field Office of the Board on April 9, 1979 from the action of the United States Postal Service, Los Angeles, California, removing him from the position of Foreman of Mails, effective April 19, 1979. The agency had charged the appellant with failure to follow instructions, drinking alcoholic beverages on duty and being on duty under the influence of alcohol. The appellant raised his alcoholism as a defense and asserted that the agency should have afforded him an opportunity for rehabilitation. The presiding official found that the evidence supported the agency's action and that the agency had given the appellant an opportunity for rehabilitation, which proved to be of no avail.

In his petition for review, the appellant has questioned the interpretation of 42 U.S.C. 4561 which mandates the establishment of the alcoholic rehabilitation programs and of 39 U.S.C. 410 which exempts the Postal Service from mandates of certain federal statutes. He has not presented any new and material evidence.

Under 5 C.F.R. 1201.115, the Board may grant a petition for review when it is established that:

> (a) New and material evidence is available that, despite due diligence, was not available when the record was closed; or
>
> (b) The decision of the presiding official is based on an erroneous interpretation of statute or regulation.

Addressing the exemptions of 39 U.S.C. 410, it is true that the Postal Service does not have to comply with 42 U.S.C. 4561. However, the Postal Service has established its own program for alcoholic rehabilitation. Thus, even though they did not have to comply with the mandates of 42 U.S.C. 4561, they have done so. The Board finds no error in the presiding official's interpretation of these regulations.

In his petition for review, the appellant has again questioned the agency's alleged failure to provide him an opportunity for rehabilitation in compliance with 42 U.S.C. 4561. The presiding official found, after examining the record, that the agency had given the appellant an opportunity for rehabilitation. His supervisors had discussed his problem with him and referred him to the agency's Program for Alcoholic Recovery. Thus, the record shows that the agency did comply with its regulations concerning rehabilitation. The Board can find no error in the interpretation of the presiding official.

The Board notes, however, that the presiding official failed to make a specific finding that the removal was for the efficiency of the service. 5 U.S.C. 7513(a). Even though the appellant did not raise this issue, the petition for review is GRANTED to allow the Board to make such a finding on the record and modify the initial decision accordingly.

Given the facts in the case, being on duty under the influence, drinking on duty and refusing to obey orders, the Board finds that the removal was for such cause as would promote the efficiency of the service.

Therefore, the initial decision is affirmed as modified by this opinion and order.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision.

For the Board:

RUTH T. PROKOP.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CHARLES J. DARRAH
v.
DEPARTMENT OF THE NAVY

Docket No.
PH075209041

OPINION AND ORDER

Appellant, Charles J. Darrah, was removed from his position as a Pipe Coverer Insulator with the Department of the Navy, Philadelphia Naval Shipyard, Philadelphia, Pennsylvania, effective August 16, 1979. The removal action was based on charges of failure to be present on the job site at the beginning of the shift on one occasion and disrespectful conduct to a supervisor after having been disciplined previously for such conduct. Appellant filed a petition for appeal of his removal with the Philadelphia Field Office of the Merit Systems Protection Board on October 4, 1979, or 49 days after the effective date of his removal.

The presiding official dismissed the appeal as untimely filed under 5 C.F.R. Section 1201.22(b), in an initial decision dated November 29, 1979, noting that, in any event, appellant's petition submitted on the Board's appeals form did not indicate why appellant believed his removal to be wrongful. The presiding official indicated that appellant had been provided an opportunity to show good cause for a waiver of the 20-day filing deadline for a petition for appeal, but that appellant had submitted nothing in addition to a note from his doctor attached to the original petition stating that appellant was under care for acute anxiety and unable to attend any hearing, supplemented by appellant's own note saying that his doctor's note explained why he did not meet the deadline. The presiding official found that the medical certificate did not show good cause for a waiver of the time limitation.

In connection with the petition for review of the dismissal of his appeal, the appellant's representative has argued that the lateness of the original appeal and the petition for review should be excused based on the doctor's certificate in the record indicating that the appellant was under medication for severe anxiety during the time in question, together with the further explanation that the medication causes some mental confusion. We agree that this circumstance represents good cause for extending the time limits for filing the petition for appeal by four weeks and the petition for review by one day. 5 C.F.R. 1201.12 and 1201.113(d).

Accordingly, the petition for review is hereby GRANTED, the initial decision dated November 29, 1979, is VACATED, and this appeal is REMANDED to the Philadelphia Field Office for further proceedings.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

Andrew F. Francetich, Roy L. Buland, Alden K. Hering, Thomas A. Thompson, Charles A. Faller, Donald G. Arnott, Francis J. Bowers, Samuel J. Lee, Wesley G. Gloyne, John Adcox, Gary A. Wiensch, and Keith F. Johnson v. Department of the Air Force	Docket No. DE075299037
Allan Anderson v. Department of the Air Force	Docket No. SF075209030
Berma F. Carter v. Department of the Navy	Docket No. AT075209012
Otho W. Lawrence v. Department of the Navy	Docket No. AT075299078
Willie C. Oliver v. Department of the Army	Docket No. AT075209058
James D. Allen v. Veterans Administration	Docket No. AT075209027
Edward J. Brazill v. National Aeronautics and Space Administration	Docket No. DC075299013
Milton J. Kramer v. National Aeronautics and Space Administration	Docket No. DC075299014
William Lucas v. National Aeronautics and Space Administration	Docket No. DC075299015

ROSINE N. SINGER
v.
INTERNATIONAL COMMUNICATION AGENCY

Docket No.
DC075299075

BARBARA L. BROWN
v.
INTERNATIONAL COMMUNICATION AGENCY

Docket No.
DC075299086

OPINION AND ORDER

The position of each appellant named above was reclassified and downgraded by the respective agencies pursuant to the authority of 5 U.S.C. 5107. Each appellant received the grade and pay retention benefits provided by 5 U.S.C. 5361 *et seq.*

The reclassification actions all were initiated after January 11, 1979, the effective date of the Civil Service Reform Act of 1978 (the Act), Pub. L. 95-454, 92 Stat. 1111. Thus the cases are to be governed by the Act and appropriate implementing regulations. *See* the Act, section 902(b), 92 Stat. at 1224; 5 C.F.R. 1201.191; and, preamble to the Office of Personnel Management's (OPM's) interim regulations, published at 44 Fed. Reg. 3444 (1979).

The actions were appealed, the contention in each case being that the downgrading had been unwarranted. The presiding officials assigned to the cases uniformly rejected the appeals as outside the Merit Systems Protection Board's (the Board) jurisdiction. The appellants have petitioned the Board to review those jurisdictional determinations. In view of the commonality of issues presented by the respective petitions, the Board has consolidated the cases for decision. *See* 5 C.F.R. 1201.36.

Under 5 U.S.C. 7701(a), the Board's appellate jurisdiction is limited to any action which is appealable to the Board under any law, rule or regulation. These appellants were incumbents of positions which were reclassified, and thus they were entitled to and provided the grade and pay retention benefits of 5 U.S.C. 5361 *et seq.* However, employees who continue to be assigned to positions which are reclassified downward, and who receive the benefits of 5 U.S.C. 5362 and 5363, may not appeal to the Board from either the reclassification of the position or the reduction in grade and/or pay which, but for the grade and pay retention provisions of the Act might otherwise have been appealable. *Atwell v. Department of the Army,* 3 MSPB 8 (1980).

Accordingly, we find that these reclassification actions are not appealable to the Board under 5 U.S.C. 7701(a), as the presiding officials held. The petitions for review, therefore, are DENIED.

This is the final decision of the Merit Systems Protection Board in these cases. Appellants are hereby notified of their right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeals are filed within thirty (30) days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RUDOLPH A. GREENE
v.
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

Docket No.
PH075209005

OPINION AND ORDER

Appellant, Rudolph A. Greene, was suspended for 31 days for falsifying his work report. For a two month period, from June 18, 1978 to August 18, 1978, appellant reported completion of 12,127 items although the correct number was 7,780. Appellant has petitioned the Board for review of the initial decision which sustained the suspension.

In the petition, as in the appeal to the field office, appellant argued that he was subjected to unequal punishment. Specifically, another employee (referenced in the initial decision as employee B) was suspended seven days for overstating a production report by 3,692 items. Appellant does not allege that his suspension was longer due to reasons of discrimination prohibited by law, but argues that equal offenses should receive equal punishment.

Appellant cites no support for the argument that all offenses of the same nature must receive uniform disciplinary action. However, under 5 U.S.C. 7513(a), an agency may take an action only for such cause as will promote the efficiency of the service. Therefore, it may be argued that when an agency treats similar offenses differently, at least one of the actions does not promote the efficiency of the service.[1]

The facts of this case, however, do not support such an argument. Appellant and employee B received substantially similar treatment, suspension, for similar offenses. The fact that the supervisor considered the employees' past work performance when deciding the length of the suspension is consistent with the requirement that an action promote the efficiency of the service.

The appellant has argued that the supervisor also should have considered his subsequent work performance, which improved after he was caught falsifying his work report. However, appellant has introduced evidence of no regulation or agency policy which imposes such a requirement, and we find no error in this regard. Appellant's improved work record, based on discovery of his falsification, is clearly worthy of less consideration than the consistently good performance of employee B.

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[1] If appellant had alleged that he received greater punishment because of prohibited discrimination, the argument would be considered an affirmative defense under 5 U.S.C. 7701(c)(2) and 5 C.F.R. 1201.56(b)(2).

The petition for review is, accordingly, denied.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

STINSON KELLY
v.
U.S. POSTAL SERVICE

Docket No.
DC075299009

OPINION AND ORDER

The initial decision of the presiding official dated June 7, 1979, dismissed the appeal without prejudice after finding that the Board lacked jurisdiction to hear it. The record showed that appellant had initiated an informal discrimination complaint within the agency on the appealable matters, and that the agency had neither issued a decision on the complaint, 5 U.S.C. 7702 (a) (2), nor had 120 days elapsed since appellant had begun the complaint process. 5 U.S.C. 7702(e) (2).

The fundamental issue in this case is whether the actions of appellant in filing an informal complaint with an EEO counselor within the agency on May 8, 1979, in which he alleged that both his suspension and removal were based upon prohibited racial discrimination, constituted the initiation of a discrimination complaint. The presiding official noted in his decision that neither the statute nor the interim regulations specifies the manner in which the issue of discrimination must be raised before the agency. The statute, however, is applicable where any issue of prohibited discrimination is "before an agency." 5 U.S.C. 7702(a) (2). The interim regulation is applicable where "(t)he appellant first raised the issue of discrimination before the agency. . . ." 5 C.F.R. 1201.153(a).

Our interim regulation under the circumstances of this appeal refers to issues of discrimination prohibited by the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, which are submitted to the agency's EEO counselor by filing a formal complaint in accordance with procedures prescribed at 29 C.F.R. 1613.214 after completion by the agency of precomplaint processing under 29 C.F.R. 1613.213. Appellant's informal complaint initiated the precomplaint processing of his allegation of prohibited racial discrimination but it did not constitute the formal complaint which brings the issue of discrimination "before the agency" as contemplated by interim regulation 5 C.F.R. 1201.153(a).

The Board's final regulations at 5 C.F.R. 1201.154(a) provide that the issue of prohibited discrimination is before an agency where "the appellant has filed a timely formal complaint of discrimination." Our section by section analysis of the final regulations at 44 Fed. Reg. 38348 (1979) does not indicate any substantive change of the interim regulation with respect to when an issue of prohibited discrimination is "before an agency" under section 7702(a)(2). We find that the interim regulation reflects our intent that it apply where a formal complaint has been filed with the agency.

The presiding official concluded incorrectly that filing an informal complaint of prohibited discrimination with the EEO counselor was sufficient to bring the action "before the agency." The interim regulation was erroneously applied by the presiding official and Board jurisdiction was improperly denied.

Accordingly, the petition for review is GRANTED, the initial decision of the presiding official is VACATED, and the case is REMANDED to the Field Office for a determination on the merits.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RAPHAEL E. MAIERS v. DEPARTMENT OF THE AIR FORCE	Docket No. SF075299095

OPINION AND ORDER

Raphael E. Maiers, appellant, was discharged from his position of Supervisory Civil Engineer because the agency concluded he had wrongfully obtained government property from a contractor and had improperly attempted to influence the subsequent investigation. Mr. Maiers appealed the removal, but after a hearing the action was affirmed. He then petitioned the Board to review the initial decision.

Appellant has alleged a number of errors by the agency and the presiding official. For reasons discussed below, we find that the initial decision contains no error of fact or law, and the petition is, therefore, denied.

The appellant alleged that the agency did not make its regulations available to him, but there was no testimony given at the hearing to substantiate this or to explain how appellant was harmed by the alleged action. In one of appellant's pre-hearing submissions to the presiding official, it was said that appellant was not allowed to "borrow" the Federal Personnel Manual and the "AFR 40 appeal series" to take to his desk. We find that appellant has not presented sufficient evidence to prove he was denied access to certain regulations, and even if access was restricted to review of the regulations in a central office, we find no harm to appellant.

Appellant also alleged that he was denied representation at the oral reply, he was told by the agency that he could not retire, and agency officials tried to make him retire. No evidence was presented at the hearing to substantiate these allegations. The agency responded to the allegations by submitting sworn statements from agency personnel who said appellant failed to name a representative and elected not to reply orally; that appellant was told of his right to retire, but was not coerced in any manner. The presiding official did not address these allegations, apparently because they were not pursued at the hearing. We find that appellant has failed to establish that the agency acted improperly in this regard, nor has he submitted new evidence which meets the criteria for review. 5 C.F.R. 1201.115.

Appellant further argued in the petition that a requested witness was not allowed by the presiding official. The witness, a public defender investigator, was not requested by appellant before the hearing. (See appellant's requests for witnesses, August 20 and 30, 1979). The appellant's representative conceded that the testimony the witness might offer would not materially aid the case, and although he could have secured the evidence through interrogatories, he declined to do so. (Hearing Transcript at 88-91.) Accordingly, the objection has no merit.

The last two objections were that the agency did not produce relevant material requested by appellant, and that the decision to remove him was delivered only three days before it was effective. No evidence was presented to prove these allegations at the hearing. In fact, the record reflects that the agency produced all material requested. Additionally, there is no evidence that delivery of the removal decision three days before the effective date, if that is what occurred, prevented appellant from filing a timely appeal or in any way harmed the presentation of this case. There is no statutory or regulatory requirement that a decision be delivered more than three days in advance of the date of the removal. *See* 5 U.S.C. 7513(b)(4) and 5 C.F.R. 752.404(f).

In summary, the errors alleged in the petition for review were, for the most part, never pursued at the initial hearing, nor did appellant establish that the errors, even if true, affected the agency's decision or caused prejudice to him. The petition does not meet the criteria for review. 5 C.F.R. 1201.115. Accordingly, it is denied.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LOUIS J. PARKER
v.
UNITED STATES POSTAL SERVICE

Docket No.
DA075209119

OPINION AND ORDER

The appellant was removed from the position of Letter Carrier, U.S. Postal Service, Gretna, Louisiana, effective November 29, 1979. His appeal to the Board's Dallas Field Office was filed on February 25, 1980, fifty-four (54) days after the deadline for filing. In his appeal, the appellant acknowledged his failure to file a timely appeal and stated that he had been incarcerated between August 5, 1979 and December 12, 1979. He asserted that during that time he had not received proper medication for a mental condition and was suffering "severe personality disorientation".

The presiding official issued his decision on March 20, 1980, and found that good cause had not been shown which would warrant an extension of the time limit to appeal beyond January 1, 1980. Because the petition was not filed until February 25, 1980, he dismissed the appeal as untimely.

Although the presiding official found good cause to extend the time limit by twenty days, the petition for review argued that good cause should have been found for granting an extension up to and through February 14, 1980. The petition for review further stated that when the appellant was released on December 12, 1979, he was again arrested and incarcerated until December 15, 1979. According to the petition, he was again arrested on or about December 20, 1979 and remained in detention until January 2, 1980. He was evaluated by a psychiatrist on January 17, 1980 and the psychiatrist's report was included in the petition for review. The report indicated that when the appellant returned to the Health Center on February 14, 1980, he complained of increased depression, however, the psychiatrist reported that the appellant did not appear unduly depressed or manic at that time.

The agency responded to the petition for review and asked that the appellant's petition be denied. The agency argued that the appellant was functioning normally and was capable of conducting his affairs properly.

The regulations at 5 C.F.R. 1201.112 provide that:

> The Board may revoke, amend or waive any of these regulations as they apply generally to all cases in accordance with the applicable procedures of the Administrative Procedure Act. A presiding official may waive a Board regulation in an individual case for good cause shown if application of the regulation is not required by statute.

Upon review of the record, the Board finds that the appellant was suffering from a mental disorder until February 14, 1980 and that there was sufficient cause to waive the time limit and consider the appeal.

Accordingly, the petition for review is GRANTED. The initial decision, DA075209119, dated March 20, 1980, dismissing the appeal for want of timeliness is REVERSED, and the case is REMANDED to the presiding official for adjudication of the appeal.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

GILBERT M. ROEDER
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
AT0300A99001

OPINION AND ORDER

Appellant applied but was not selected for three aviation-related Federal positions. Two of the positions were filled from within the agencies concerned. Appellant was informed that he could not be considered for the third position due to the fact that he did not have Civil Service status and was not reachable on the Civil Service register.

In his appeal to the Board, appellant alleged unfair and improper employment practices within the meaning of 5 C.F.R. Part 300, subpart A. The presiding official's initial decision of September 11, 1979, dismissed the appeal for lack of jurisdiction. Appellant's petition for review, received October 15, 1979, alleges that the presiding official erroneously interpreted Part 300 regarding employment practices.

The presiding official found that 5 C.F.R. 300.101 relates to federal employment practices generally, "employment practices" being defined therein as "the development and use of examinations, qualification standards, tests, and other measurement instruments." He concluded that the filling of a particular vacancy is thus not an "employment practice" within the meaning of Part 300. The Board agrees with that conclusion under the circumstances of this case. Appellant did not take issue with OPM's failure to rate properly his application for a specific position or his application for placement on the register. Rather, he contended that the hiring practices of the agencies involved were unfair; that proper procedures were not followed; and that one of the agencies relied on improper information, *i.e.*, that he had neither Civil Service status nor was reachable on the Civil Service Register, in making its decision not to hire him. We find that he has thereby alleged no "employment practice" which is appealable to the Board.

The presiding official also interpreted 5 C.F.R. 300.104(c)(2), 44 Fed. Reg. 48951 (1979), as providing that employment practices administered or required by the agency which violate a basic

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requirement of 5 C.F.R. 300.103 shall be grieved within the agency. The Board agrees with this interpretation and with the finding of the presiding official that appellant had no Part 300 right of appeal to the Board because his failure to be selected for the Air Safety Investigator and Airspace System Inspector Pilot positions was within the control of the agencies and did not concern a matter applied to him by the Office of Personnel Management.

Accordingly, the petition for review is hereby DENIED.

This is the final decision of the Merit Systems Protection Board. The appellant is hereby notified of his right to petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review the Board's decision, provided, however, that such appeal is filed within thirty (30) days of receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

MYRON T. WEBB
v.
U.S. POSTAL SERVICE

Docket No.
CH075299067

OPINION AND ORDER

The appellant, acting *pro se,* filed a letter constituting his petition for appeal with the Board's Chicago Field Office on June 29, 1979, from the action of the U.S. Postal Service removing him effective July 13, 1979, from his position of Distribution Clerk, PS-2315-05. The agency's removal action was grounded upon the appellant's alleged absence without permission from his scheduled tour of duty at the Chicago Main Post Office Building from March 29 through May 16, 1979, and upon the appellant's alleged threat made on postal premises on April 6, 1979, to kill his supervisor and his supervisor's family.

The appellant's petition requested "a day in court to clear this matter up," and notified the Field Office that he was then under medical care in the Veterans Administration Lakeside Hospital in Chicago. By letter to the appellant dated July 18, 1979, and a "Notice of Hearing" the presiding official informed the appellant that his request for a "day in court" was construed as a request for a hearing and informed him that the hearing was set for August 10, 1979. The presiding official requested both that the appellant confirm in writing by August 1, 1979, that he would attend the hearing and that he complete a designation of representative form.

On July 27, 1979, the appellant filed with the Field Office his "Designation of Appellant's Representative" [1] and requested that all correspondence be forwarded to the appellant at the VA Hospital. The appellant failed, however, to provide written confirmation that he would attend the hearing on August 10. By a note inserted into the record dated August 7, 1979, the presiding official stated that he notified the agency representative that the appellant had not responded to the July 18, 1979 letter requesting confirmation of his intent to appear at the hearing "and that he had therefore waived his right to a hearing." By letter dated August 8, 1979, the presiding official notified the appellant and the agency that all submissions should be made by the close of the record on August 22, 1979.

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[1] The appellant's designation of representative was apparently completed by the appellant himself and named an attorney who did not make any appearance on the record on behalf of the appellant.

On the day of the hearing, August 10, 1979, the appellant appeared at the Field Office for his hearing. The agency representative did not appear, as the presiding official had informed him on August 9 that no hearing would be held. The presiding official's handwritten note on the record reflected that he informed the appellant on August 10 that he had waived his right to a hearing. The note further reflected that the appellant "stated that he felt that all he had to do was fill out his 'designation of representative' form to get his hearing." The presiding official declined to hold a hearing and informed the appellant that he should state his opinion in writing and submit it into the record.

By initial decision dated August 31, 1979, the presiding official found upon examination of the agency's submissions on the record that the two charges against the appellant were sustained and decided that the agency's removal action be affirmed.

The appellant, by his representative, timely filed with the Board a letter dated September 28, 1979, constituting his petition for review. The petition stated as reasons for review that the appellant could substantiate his absences to September 10, 1979, that he was not afforded his right to a hearing before the presiding official, and that the medical records at the VA Hospital would verify that the appellant was not mentally responsible for his actions. The agency, by response filed October 26, 1979, maintained that the appellant never provided documentation justifying his absences, that the agency was informed by the presiding official that the scheduled hearing would not be held and the appeal would be adjudicated on the record, and that the appellant did not submit to the agency any evidence of the appellant's alleged mental problems prior to September 28, 1979.

The petition for review of the initial decision of the presiding official is GRANTED.

The right to a hearing in connection with a civilian government employment dismissal is dependent upon statute or regulation. *Powers v. United States*, 169 Ct. Cl. 626, 630 (1965). The provisions of 5 U.S.C. 7701(a)(1), are perspicuous that in any action appealable to the Board, the appellant shall have the right "to a hearing for which a transcript shall be kept." *See Murray v. Defense Mapping Agency*, 1 MSPB 338 (1980). Pursuant to the Board's regulations, "an appellant has a right to a hearing. Alternatively, the appellant may choose to have the determination based on the record." 5 C.F.R. 1201.24(c).

A federal employee may conceivably waive his right to a hearing in writing; similarly, his actions might amount to a waiver. *Patterson v. United States*, 319 F.2d 882, 885 (Ct. Cl. 1963). Waiver has been defined as the intentional relinquishment or abandonment of a known right or privilege. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Chambers & Co. v. Equitable Life Assurance Society*, 224 F.2d 338, 345 (5th Cir. 1955); *Phillips v. Lagaly*, 214 F.2d 527, 529 (10th Cir. 1954). Generally, to make out a case of implied waiver of a legal right, there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to an estoppel on his part. *Lynn v. Bureau of Indian Affairs*, 1 MSPB 331 (1980). *See United States v. Chichester*, 312 F.2d 275, 283 (9th Cir. 1963); *Pacific States Corporation v. Hall*, 166 F.2d 668, 671 (9th Cir. 1948); *Hunter Mill Co. v. Koch*, 82 F.2d 735, 736 (10th Cir. 1936); *Victor Products Corp. v. Yates-American Machine Co.*, 54 F.2d 1062, 1064 (4th Cir. 1932).

It is patent from the record, as found by the presiding official, that the appellant requested a hearing in his petition for appeal. The appellant filed his designation of representative and appeared at the Field Office on the day set for hearing. The Board perceives from the record that the appellant, acting *pro se*, was under the mistaken impression that he would be accorded a hearing by filing his designation of representative with the Field Office.

The heavy weight of evidence on the record denotes that the appellant desired a hearing as was his right under 5 U.S.C. 7701(a)(1), and 5 C.F.R. 1201.24(c). He did not clearly and unequivocally by his conduct "choose to have the determination based on the record." *Id.* The right to be heard where one's interests are acutely affected by the actions of an administrative agency is of cardinal importance. "It is fundamentally abhorrent to our system of jurisprudence to deny a hearing to a litigant where justice and law require that a hearing be held." *National Broadcasting Co. v. Federal Communications Commission*, 362 F.2d 946, 953 (D.C. Cir. 1966).

The appellant was less than vigilant in protecting his right to a hearing. He failed to respond to the request for confirmation of the hearing, failed to submit a statement of witnesses to be called on his behalf, and upon being informed on the day set for hearing that he was deemed to have waived his right to hearing, failed to submit timely representations to the presiding official as he was told he could do. We do not imply by our decision that the presiding official acted improperly under 5 C.F.R. 1201.41 in placing a condition on the appellant's exercise of his hearing right. Nonetheless, the appellant, who was of limited sophistication concerning such matters, acted *pro se* prior to the date set for the hearing, and he evidenced an intention to pursue his appeal by complying with the presiding official's direction to submit a designation of representative form. Most important, in this regard, is the fact that he presented himself for the hearing at the scheduled time and place and explained in his own behalf that he had simply misunderstood the July 18, 1979 letter from the presiding official. Further, we note that the hearing had been set for a date which would have allowed the presiding official to reschedule the hearing and still issue a decision in accordance with the 120-day time limit imposed by the Board. Under these circumstances, we conclude that the appellant cannot be deemed to have knowingly or unequivocally waived his right to hearing.

Accordingly, the initial decision of the presiding official is VACATED in its findings of fact and REVERSED in its decision that the agency's removal action be affirmed, and the case is REMANDED to the Field Office for a hearing on the merits.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 2, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

FRANCIS C. CUNNINGHAM v. INTERSTATE COMMERCE COMMISSION	Docket No. PH300A99002

OPINION AND ORDER

The appellant filed an appeal with the Philadelphia Field Office of the Board on July 31, 1979, from an action taken by the Interstate Commerce Commission rejecting his grievance for non-selection for promotion to a position of Supervisory Auditor, GS-14. The appellant contended that the agency action was discriminatory and part of a pattern of harassment which had been directed against him since his participation in criminal investigations and prosecutions. He also alleged his non-selection and grievance denial violated the Federal Merit Promotion Policy (5 C.F.R. part 300, subpart A (1979)). The presiding official dismissed the appeal for lack of jurisdiction in the Board.

In his petition for review, the appellant asserts that the presiding official erred as a matter of law in concluding that the Merit Systems Protection Board lacked jurisdiction over the appeal.

The Board has jurisdiction over any action for which jurisdiction is granted by the regulations of the Office of Personnel Management (OPM) (5 C.F.R. 1203.3(a)(8) (1979)). The pertinent regulation involved in this petition, 5 C.F.R. 300.104 (1979), states:

> A candidate who believes that an employment practice which was applied to him and which is administered or required by the Office of Personnel Management violates a basic requirement in section 300.103 is entitled to appeal to the Merit Systems Protection Board.

The presiding official decided that the assertion by the appellant, a highly qualified candidate for the promotion in issue, that he should have been selected on the basis of his alleged superior qualifications and the subsequent denial of his grievance were not employment practices as defined in 5 C.F.R. part 300 (1979), and were not matters administered or required by OPM. Therefore, the appellant had no statutory or regulatory right of appeal, and the issues raised were not within the purview of the Board.

"Employment practices" as used in 5 C.F.R. part 300, subpart A (1979), include "the development and use of examinations, qualification standards, tests, and other measurement instruments." 5 C.F.R. 300.101 (1979). The non-selection of the appellant who had been ranked among the five best qualified candidates for the promotion and the denial of his grievance on this action are not employment practices as defined in 5 C.F.R. 300.101 (1979), and which are administered or required by OPM. Thus, the Board finds that the presiding official did not err in dismissing the appeal for lack of jurisdiction in the Board.

The petition for review also asserts that the Board has jurisdiction because the appellant avers discrimination in his grievance. The Board's appellate jurisdiction includes "actions otherwise appealable to the Board involving an allegation of discrimination." *See* 5 C.F.R. 1201.3(a)(8) (1979). Since the only action involved has been determined not to be appealable, this subsection does not give the Board jurisdiction.

The appellant's contention that his non-selection was part of a pattern of discrimination and harassment directed against him for his participation in criminal investigations and prosecutions may constitute an allegation of a prohibited personnel practice under 5 U.S.C. 2302(b)(8) (Supp. II 1978). Although the Board may hear and decide an allegation of prohibited personnel practice as a defense in an otherwise appealable action under 5 U.S.C. 7701(c)(2)(B) (Supp. II 1978), such an allegation standing alone does not serve to confer appellate jurisdiction upon the Board. *See Gerald C. Crary v. Federal Aviation Administration* 1 MSPB 438 (1980).

However, the appellant's allegation that his non-selection was a reprisal for his participation in criminal investigations and prosecutions, if accurate, is cognizable by the Special Counsel as a "personnel action" which he may investigate pursuant to his authority under 5 U.S.C. 1206 (Supp. II 1978). The scope of Section 1206 embraces all personnel actions defined in 5 U.S.C. 2302 (Supp. II 1978), providing broader jurisdiction than the Board's appellate authority.

Accordingly, the petition for review is DENIED. This is the final decision of the Merit Systems Protection Board in this case. The appellant is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) calendar days of receipt of this decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

RONALD G. ELSE
v.
U.S. DEPARTMENT OF JUSTICE

Docket No.
DA075299018

OPINION AND ORDER

Appellant was reassigned from his position as Personnel Management Specialist at the Federal Correctional Institute, Seagoville, Texas, to a comparable position at the Federal Prison Camp, Safford, Arizona. Upon his refusal to accept the reassignment, and for absence without leave from the new position, the Safford, Arizona facility processed his removal.

Appellant requested and received a hearing on appeal to the Board's San Francisco Field Office. The presiding official found that appellant's procedural rights had not been violated, and that the reassignment, as well as the subsequent removal action, had been taken for the efficiency of the service.

The criteria for Board review of an initial decision are set forth at 5 C.F.R. 1201.115. Appellant does not allege that there now exists new and material evidence which was not available when the record was closed, but does again allege violation of his right to the 30-day notice period and the right of an employee to be retained in an active duty status during the notice period. He also asserts that the penalty of removal was too harsh and was not undertaken in order to promote the efficiency of the service.

The presiding official, in his initial decision, properly found that appellant had been effectively reassigned from his position at the Federal Correctional Institute, Seagoville, Texas, to the Federal Prison Camp, Safford, Arizona, despite his failure to report there, and thus that the Safford facility did have the authority to remove him for refusal to obey a proper order and for unauthorized absence. *See Burton v. United States*, 404 F.2d 365 at 371, 186 Ct. Cl. 172, (1968), *cert. denied*, 394 U.S. 1002 (1969).

Appellant contends that he was wrongfully suspended during the notice period. The presiding official found that after the reassignment had been effected, it followed that during the period in question he was not "suspended" from Seagoville, but rather was properly considered to be in an AWOL status from his assigned position in Safford. The presiding official found, as the record shows, that appellant had 32 days' advance notice of his removal. The Board finds that the 30-day notice requirement of 5 U.S.C. 7513(b)(1) was thus correctly interpreted and applied by the presiding official.

It is usually very difficult to disrupt a family and relocate in a new geographic area. Nonetheless, hardship, inconvenience, and "subjective satisfaction" are not, in themselves, sufficient reasons for refusing reassignment. *See Comberiate v. United States*, 203 Ct. Cl. 285, 290 (1973). The hardship asserted by appellant is based upon the usual difficulties in relocating. While we concede the difficulties which may be involved, we find that within the bounds set out below, removal is not too harsh or unusual a penalty for refusing reassignment.

An adverse action such as removal may only be taken against a competitive civil service employee for "such cause as will promote the efficiency of the service." 5 U.S.C. 7513(a). Thus while an agency has wide discretion in reassigning employees pursuant to 5 C.F.R. 335.102, *see Comberiate, supra,* before removing an employee for refusing reassignment an agency must show more than a rational basis for the transfer, *i.e.,* "job requirements." An agency is not permitted to use reassignment in order to obtain a removal, and thereby deprive the employee of appeal rights. *Motto v. United States*, 335 F. Supp. 694 (E.D. La. 1971), *aff'd* 502 F.2d 1165 (5th Cir. 1974), *cert. denied*, 420 U.S. 927 (1975). Agencies must prove by a preponderance of the evidence that employee reassignments are based upon legitimate management reasons. *Jack Ketterer v. U.S. Department of Agriculture*, 2 MSPB 459 (1980); *McClelland v. Andrus*, 606 F.2d 1278 (1979).

We find that the presiding official did address the issues in the case properly and in accordance with the case law cited above. He made several pertinent findings, based upon specific hearing transcript references and documentation submitted by the parties:

1. That appellant had certain job-related problems relating to properly advising management on personnel matters at the Seagoville, Texas, facility.
2. That the appellant was suited for the Safford, Arizona position as a result of his experience and qualifications.
3. That appellant's "strong" point, *i.e.,* technical personnel ability, was sorely needed at Safford.
4. That the transfer was in no way punitive.
5. That the transfer was not disciplinary in nature.
6. That the transfer was not the purpose of forcing appellant to resign or putting him in a position to cause him to disobey an order.

7. That both facilities would benefit by the transfer.

Additionally, according to appellant's own statements, he did not inform the agency that he could not or would not accept a transfer until ten days *after* his receipt of the notice of reassignment. There is thus little basis offered which supports appellant's contention that the agency had created and condoned the situation in order to bring about the adverse action.

Upon examining the record we find that the presiding official correctly applied the preponderance of the evidence standard of 5 U.S.C. 7701(c)(1)(B).

Accordingly, the petition is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby notified of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days of receipt of this decision by appellant.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALFRED O. HERRERA
v.
DEPARTMENT OF HEALTH,
EDUCATION, AND WELFARE

Docket No.
DA531D09011

OPINION AND ORDER

Petitioner, employed as a Quality Review Specialist with the Social Security Administration, New Orleans, Louisiana, appealed the denial of his within-grade step increase to the Board's Dallas Field Office. The presiding official, citing *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980), found that the agency's determination was supported by substantial evidence and affirmed it.

In his petition for review, petitioner has asserted that the agency violated merit system principles and thereby engaged in a prohibited personnel practice under the Civil Service Reform Act of 1978, by denying his step increase without having established a performance appraisal system as required by 5 U.S.C. 4302, or complying with the provisions for actions based on unacceptable performance under 5 U.S.C. 4303.

The Board held in *Parker, supra*, that agencies are not precluded from making acceptable level of competence (ALOC) determinations in the post-Reform Act, pre-appraisal system period. See also: *Pedersen v. Department of Health, Education, and Welfare*, 3 MSPM 106 (1980); *Ronald E. Spatz v Department of Health, Education, and Welfare*, 3 MSPB 108 (1980). Therefore, the agency could make the ALOC determination without the establishment of the appraisal system. Under these circumstances, the Board finds that there was no violation of 5 U.S.C. 4302 and that the petitioner has not established the presence of a prohibited personnel practice. 5 U.S.C. 7701(c)(2)(B).

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court not later than thirty (30) days after appellant's receipt of this order.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JEANNE F. JEFFERY
v.
DEPARTMENT OF THE TREASURY

Docket No.
SF315H09002

OPINION AND ORDER

FACTUAL BACKGROUND

Pursuant to an appointment from the Civil Service Register, petitioner commenced her career conditional employment with the Internal Revenue Service, Los Angeles, California, effective July 3, 1978. On June 29, 1979, she received an advance notice of termination for pre-appointment reasons. The advance notice was followed by a decision to terminate issued to her on July 2, 1979, and stating an effective time of removal as of 3:45 p.m. the same date.

On appeal to the San Francisco Field Office of the Board, petitioner relied on FPM ch. 315, subch. 8-4(f) (December 21, 1976), which she contended made her separation effective at midnight, July 2, 1979. She asserted that since she completed her probationary period at the end of her tour of duty at 4:45 p.m. on July 2, 1979, she was entitled to all the procedural rights afforded in adverse actions by 5 C.F.R. Part 752 and FPM 752, Subpart B.

The agency contended, however, that FPM ch. 315, subch. 8-4(f) merely advises, but does not mandate, that termination during probation occur no later than the day before probation is to be completed, or that termination be made effective at midnight, but that the agency may specify the effective time of removal.

The presiding official found that FPM ch. 315, subch. 8-4(f) does not require that all terminations become effective at midnight, nor does it require that probationers be terminated the day before the probation is to be completed. Therefore, he concluded that the agency acted in accordance with FPM directives by specifying that petitioner's termination became effective at 3:45 p.m., July 2, 1979, and the termination thereby became effective before petitioner completed her probationary period. Hence, he held that petitioner was not entitled to the procedural safeguards provided to career employees in adverse actions.

On review, petitioner alleged that the presiding official erroneously interpreted FPM ch. 315, subch. 8-4(f) as follows:

> The above-referenced FPM section cautions agencies to separate probationers *no later* than the day before the probationary period will have been completed because separations are effective at midnight unless otherwise stated, and the probationary period ends *at the end of a tour of duty.* [Original emphasis]. (Initial decision No. SF315H09002 (October 10, 1979), at 4).

Petitioner objected specifically to the phrase "unless otherwise stated," contending that that phrase was not contained within that FPM section, that the phrase was the only basis for the presiding official's finding, and that it was contrary to the plain meaning of that section.

ISSUE

The sole issue presented on review is whether the presiding official erred in applying 5 C.F.R. 315.805 as interpreted in FPM ch. 315, subch. 8-4(f) to mean that the agency could properly specify a time other than midnight as the effective time of removal.

DISCUSSION

FPM ch. 315, subch. 8-4(f), upon which both parties to this matter heavily rely, provides, in pertinent part, for the following procedures in the separation of probationers:

> . . . the employee's separation from the rolls must be effected before the employee has completed his probationary or trial period. Otherwise, the procedures applicable to the separation of a career-conditional employee who has completed his probationary period are mandatory. To separate an employee before the completion of the probationary period, an agency must separate him before the end of probation, which is the day before the anniversary date. Because separations are effective at midnight and probationary periods are completed at the end of a tour of duty, it is advisable for an agency that wishes to separate a probationer to separate him no later than the day before probation will have been completed.

That section mandates that, in order for a separation before completion of the probationary period to be effective, the separation "must" occur "before the end of (the probationer's) tour of duty on the last day of probation, which is the day before the anniversary date." [1] In the instant case, petitioner's appointment was effective July 3, 1978; therefore her anniversary date was July 3, 1979. In order to effect her separation before completion of her probationary period, her separation must have been effected before the end of her tour of duty on the last day of her probationary period, i.e., before 4:45 p.m., July 2, 1979. Since the agency issued to petitioner its decision to terminate effective 3:45 p.m., July 2, 1979, the agency acted in compliance with FPM ch. 315, subch. 8-4(f).

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[1] This provision, of course, is mandatory only as the interpretive gloss placed by OPM upon its own regulations at 5 C.F.R. 315.804 and 315.805, since it has not been published in accordance with 5 U.S.C. 1103(b). As such, OPM's interpretative rule is neither inconsistent with the regulations which it interprets nor beyond OPM's delegated authority pursuant to 5 U.S.C. 3321 and 1104(a)(1).

We find that the language in FPM ch. 315, subch. 8-4(f), providing that a probationer be separated "no later than the day before probation will have been completed," is advisory rather than mandatory. Indeed, the word "advisable" is used in reference thereto as opposed to the word "must" used in the preceding sentence. Consequently, petitioner's contention that her separation became effective at midnight, July 2, 1979, subsequent to the completion of her probationary period at 4:45 p.m. is untenable, and she is not entitled to the procedural safeguards afforded by 5 U.S.C. 7511 et seq., 5 C.F.R. parts 752 and 1201.

While petitioner is correct in stating that the FPM does not contain the words "unless otherwise stated," we find no error in the presiding official's use of that phrase. Rather, the specific requirement of the regulations as interpreted in the FPM is only that the separation action be effected prior to the end of the last day before the anniversary date, which the agency did in this case. The petition points to no statutory or regulatory provision prohibiting an agency's setting not only a date, but also a time on that date at which the action will become effective.

CONCLUSION

For all of the foregoing reasons, we find that there was no error committed by the presiding official in his application of 5 C.F.R. 315.805 as interpreted in FPM ch. 315, subch. 8-4(f). Therefore, the petition does not meet the criteria for review set forth in 5 C.F.R. 1201.115(b).

Accordingly, the petition for review is DENIED.

This is the final decision of the Merit Systems Protection Board in this case. Petitioner is hereby notified of her right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days of receipt of this decision by petitioner.

For the Board:

Ersa H. Poston.

Washington, D.C., *October 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

In the Matter of:
MANUEL MUNOZ
AND
HANS M. MARK, SECRETARY
U.S. DEPARTMENT OF THE AIR FORCE

Docket No.
HQ120800016

OPINION

This case is before the Board on the agency's motion for reconsideration *en banc* or, in the alternative, for clarification (First Motion), filed September 23, 1980, and the agency's supplement to its motion for reconsideration *en banc* filed September 30, 1980 (Supplemental Motion).

On August 29, 1980, the Acting Special Counsel filed a motion to compel compliance alleging that the Department of the Air Force had failed to comply with the terms of Board Orders dated July 3, 1980, July 18, 1980, and August 18, 1980, staying the removal of Manuel Munoz from his employment at Kelly Air Force Base. On September 12, 1980, the Air Force filed a submission with the Board indicating that the agency misunderstood the nature of a stay under 5 U.S.C. sec. 1208 and had placed Mr. Munoz in a temporary employee status during the effective period of the stay orders. By Order dated September 18, 1980, the Board directed the Acting Special Counsel on or before September 25, 1980, to file a report with supporting documents, setting forth the actual loss incurred by Mr. Munoz as a direct result of the agency's error, and allowed the agency an opportunity to respond to the Acting Special Counsel's submission. The agency responded on September 23, 1980, with its First Motion. On September 25, 1980, the Acting Special Counsel filed a Partial Response on Mr. Munoz's loss and asked for an enlargement of time in which to file a complete report. On September 30, 1980, the Board granted the Acting Special Counsel's request and extended the time for filing of the complete report until October 3, 1980. On September 30, the agency filed its Supplemental Motion and a reply to the Acting Special Counsel's Partial Response.

The agency's First Motion presents two issues which can be adequately resolved by clarifying the Board's Order of September 18, 1980: first, whether the Board has the authority to stay the removal of an employee after the action's effective date, and second, if the Board may stay a removal after its effective date, whether the employee is thereby returned to the status of a permanent employee.

On the first issue, the language of the applicable statute, 5 U.S.C. sec. 1208(a)(1), is dispositive:

> The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 15 calendar days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action *was taken*, or is to be taken, as a result of a prohibited personnel practice.

(Emphasis added.) The plain meaning of this provision authorizes the stay of a personnel action after its effective date. Thus it was clearly contemplated by Congress that the Acting Special Counsel would petition for stays after the personnel actions in question had taken effect, and that the requested stays would be granted by the Board if the standards set forth in 5 U.S.C. sec. 1208(a), (b) and (c) were met.[1]

On the second issue, whether the employee is returned to permanent status, the legislative history of 5 U.S.C. sec. 1208 reveals that Congress intended to stay to "*suspend* retaliatory [agency] actions." S. Rep. No. 969, 95th Cong. 2d Sess. 8 (1978) (emphasis added); 124 Cong. Rec. S14282 (daily ed. Aug. 24, 1978) (remarks of Sen. Javits) (emphasis added). Further, in *In the Matter of Charles B. Coffield, et al.*, 3 MSPB 46 (1980) at 47, the Board stated that "[t]he purpose of a stay order is to preserve the status quo." [2] Thus, where the removal of a permanent employee has been stayed under 5 U.S.C. sec. 1208, the employee retains permanent employee status until the expiration of the stay.

In this case Mr. Munoz was a permanent employee prior to the removal action in question. The effect of suspending Mr. Munoz's removal should have been to return Mr. Munoz to permanent employee status for the period of the stay. Moreover, in the Board's original Order dated July 3, 1980, the terms of which were extended by Orders dated July 18, 1980, and August 18, 1980, the Chairwoman ordered the agency not to impose upon Mr. Munoz "any requirement which is not required of other employees of comparable position, salary or grade level." It appears that by placing Mr. Munoz in a temporary employee status the agency may have required Mr. Munoz to forego some of the benefits, such as paid leave, enjoyed by employees of comparable position, salary or grade level.

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[1] Other instances where the Board has stayed personnel actions after their effective dates include the following cases: *In the Matter of Robert J. Frazier, et al.*, MSPB Docket No. SC-79-3, Order dated June 15, 1979; *In the Matter of Veterans Administration, et al.*, MSPB Docket No. HQ120800001-80-25a, Order dated Feb. 5, 1980; *In the Matter of Charles B. Coffield, et al.*, MSPB Docket No. HQ120800009ab, Order dated April 7, 1980; *In the Matter of Richard C. Curtis, et al.*, MSPB Docket No. HQ120800022ab, Order dated July 23, 1980; *Acting Special Counsel v. Department of Justice*, MSPB Docket No. HQ120800030, Order dated Sept. 16, 1980; *Acting Special Counsel v. U.S. Department of the Army*, MSPB Docket No. HQ120800032, Order dated Sept. 23, 1980.

[2] *See also Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F. 2d 841, 844 (D.C. Cir. 1977); *Reed v. Rhodes*, 472 F. Supp 603, 605 (N.D. Ohio 1979).

The agency cites FPM Ch. 315 par. 2-2 (1974) in apparent support of an argument that, once the Board's stay of a removal action expires and the removal becomes effective, the agency would be compelled to re-do any procedural steps already taken under 5 C.F.R. Part 752 (1980) in effecting the employee's removal. However, that FPM provision contains nothing which can be read as implying that the procedural guarantees of 5 C.F.R. Part 752 (1980) must be performed twice as to a single adverse action. The employee's removal at the end of a stay is effected through the expiration of the suspension of the original agency action, not through a second adverse action. The agency also asserts that the Chairwoman "erred" in interpreting FPM Ch. 316 par. 7-5 (1978), which addresses the separation of temporary employees. Inasmuch as Mr. Munoz was not a temporary employee, that issuance has no bearing on the stay.

Furthermore, the Board does not view unpublished FPM issuances dating prior to the enactment of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), as binding on the Board's interpretation of the Act's provisions.[3] Certainly there is no precedent in prior legislation for the stay authority granted to the Board by 5 U.S.C. sec. 1208. The Civil Service Commission officials who in 1974 authored FPM Ch. 315, par. 2-2 (1974) could not have contemplated the novel stay procedure authorized by the Civil Service Reform Act, which has been hailed as "the most comprehensive reform of the Federal work force since passage of the Pendleton Act in 1883." S. Rep. No. 969, 95th Cong., 2d Sess. 1 (1978).

The effect of the Board's stay of an agency personnel action is to suspend that action. Where the personnel action in question is the removal of a permanent employee, the failure to return the employee to permanent status during the pendency of the stay constitutes non-compliance with the stay order.

The interests of administrative economy would not be served by further briefing or oral argument on these issues. Accordingly, the agency's request for an extension of time in which to brief these issues, for oral argument and for a stay of the Board's September 18th Order pending consideration of this matter by the Board is DENIED.

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[3] *See* 5 U.S.C. sec. 1103(b)(1).

The agency's Supplemental Motion presents two additional issues:

(1) Whether the Board has the authority to order the agency to reimburse Mr. Munoz for any loss he may have suffered as a result of the agency's noncompliance with the Board's orders; and

(2) Whether the Acting Special Counsel is estopped from seeking compliance by her failure to prosecute this case in a timely manner.

In view of the fact that the Acting Special Counsel stated in her Partial Response that Mr. Munoz did occur some loss, we believe these issues are appropriate subjects for briefing by the parties.

Accordingly, the agency's Supplemental Motion is GRANTED in part, and the agency is ordered to submit on or before October 17, 1980, a brief on these issues and any reply it might have to the complete report to be filed by the Acting Special Counsel on October 3, 1980. The Acting Special Counsel is ordered to file a brief in response to the agency's brief on October 24, 1980.

The agency's requests for oral argument on these issues and for an evidentiary hearing on the amount of loss Mr. Munoz incurred are DENIED, since they do not now appear to be necessary to a fair determination of these matters. If the Board should decide in the course of this proceeding that oral argument or an evidentiary hearing would be appropriate, we will so order.

For the Board:

RUTH T. PROKOP,
Chairwoman.

ERSA H. POSTON,
Vice Chair.

RONALD P. WERTHEIM,
Member.

Washington, D.C., *October 3, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

NATHAN G. POLITE
v.
DEPARTMENT OF THE NAVY

Docket No.
AT075209091

OPINION AND ORDER

Petitioner was removed, effective August 17, 1979, from his position of Pipefitter, Charleston Naval Shipyard, for threatening to inflict bodily injury on another and for disrespectful behavior to a superior. Both charges arose from a dispute between petitioner and a supervisor over petitioner's failure to wear safety glasses in a work area.

On appeal to the Atlanta Field Office of the Board, petitioner alleged that the charges brought against him were false and were motivated by racial discrimination. Pursuant to petitioner's request, a hearing was held on the merits of the case. The presiding official found the charges sustained by a preponderance of the evidence. She also found that petitioner failed to establish a prima facie case of racial discrimination.

This petition for review is based, *inter alia,* upon: (1) alleged bias on the part of the presiding official; (2) petitioner's contention that he had indeed established a prima facie case of racial discrimination; and (3) petitioner's denial that he had threatened bodily injury to his superior. Petitioner does not challenge that part of the initial decision sustaining the charge of disrespectful conduct to a superior. In its response to the petition, the agency urged that the petition be denied for failure to meet the criteria for review.

In regard to petitioner's first contention, this Board stated in *Weaver v. Department of the Navy,* 2 MSPB 297 (1980), that "(a)n allegation of bias is a serious matter challenging the integrity of the presiding official and going to the core of the judicial function. Such charges are not taken lightly, and should not be lightly presented." 1 MSPB 300. Here petitioner made general allegations of bias without stating the specific instances of alleged biased conduct to which he objected. He stated that the presiding official "showed temper," "was very racist," "denied our objections and granted theirs," and "was insulting." There is nothing in the record to support petitioner's allegations. Rather, the record discloses that the presiding official adopted a lenient attitude with respect to the extensive and, in some instances, repetitious, examination of witnesses she permitted the parties. The presiding official went so far as to allow one of petitioner's witnesses, whose testimony she had previously ruled irrelevant, to testify.[1] Further, scrutiny of the record reveals no abuse of discretion or bias on the part of the presiding official. *See also In the Matter of King*, 1 MSPB 144 (1979).

Petitioner next contended that he had established a prima facie case of racial discrimination. As the presiding official correctly stated, under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), and *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 98 S. Ct. 2943 (1978), the burden of making out a prima facie case of racial discrimination rested with petitioner.

Petitioner alleged that Mr. Seyle's action in reporting the incident was motivated by racial discrimination. He testified that Mr. Seyle had engaged in prohibited discriminatory practices against at least one other employee. However, petitioner presented no evidence to prove either allegation. He voluntarily withdrew the witness who was expected to testify in that regard. (Tr. p. 117).

On the other hand, there was testimony indicating that Mr. Seyle demanded strict compliance by his subordinates in the use of safety equipment. (Tr. p. 55). Moreover, on review, petitioner asserted that Mr. Seyle habitually engaged in "harassment" of employees with respect to the use of safety equipment. He did not state that such "harassment" was based on racial discrimination. There was also testimony to the effect that Mr. Seyle used profane language in speaking to employees in general (Tr. p. 130), and, in doing so, made no distinction along racial lines.

Since petitioner presented no further evidence of racial discrimination, he failed to sustain his burden of showing a pattern of practice of disparity of treatment and that such difference in treatment was based on racial grounds. *See Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843 (1977).

Finally, petitioner denied that he threatened his superior with bodily harm. Several witnesses testified that petitioner did, in fact, threaten to punch the supervisor. Petitioner offered no evidence and presented no witnesses to testify in his behalf on this issue. On review, petitioner referred to a statement made by the supervisor that he did not feel "necessarily" threatened by petitioner. The thrust of the supervisor's testimony was that, although petitioner threatened him with physical injury, he did no believe that petitioner intended to carry out the threat immediately. (Tr. pp. 29-31).

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[1] The witness in question, Mr. R. M. Clements, was expected to testify that Mr. R. W. Seyle, the supervisor involved in the dispute, was absent from the investigative discussion of the incident. The unfavorable ruling was based on the presiding official's determination that Mr. Seyle's absence was not controverted, and since Mr. Clements was not an eyewitness to the incident, his testimony was irrelevant. However, after strong objections by the petitioner and his representative, she thereafter permitted him to testify for another limited purpose but, upon her own inquiry, allowed him to verify that Mr. Seyle was not present at the investigative discussion. Thus, the testimony petitioner and his representative so vigorously sought to elicit was made a part of the record. (Tr. pp. 117 to 134, 129).

Nevertheless, it was the threat *per se* and not the supervisor's subjective feelings that constituted the punishable offense. The testimony adduced at the hearing overwhelmingly supported the charge of threatening to inflict bodily injury, and we can find no sound reason for discrediting the testimony of the witnesses. Further, petitioner failed to present any evidence that the charge was false. Therefore, when further considered in light of petitioner's past disciplinary record which demonstrates an inclination to such conduct, the charge was supported by a preponderance of the evidence.

We therefore find that, for the foregoing reasons, the petition fails to meet the criteria for review under 5 C.F.R. 1201.115. Accordingly, the petition for review is hereby DENIED.

This is a final decision of the Merit Systems Protection Board. The petitioner has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. The petitioner also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. district court. Either a petition to EEOC or a civil action in a U.S. district court must be filed no later than 30 days after the petitioner's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

HERMAN J. REDDING
v.
DEPARTMENT OF THE INTERIOR

Docket No.
PH035109021

OPINION AND ORDER

The appellant was separated from his position by a reduction in force, and he appealed to the Board's Philadelphia Field Office. He contested the agency's determination of his veteran's preference status and the computation of his service computation date. The agency determined that the appellant was not entitled to veteran's preference and did not consider any of the appellant's time in the Army Reserve, other than his initial six months active duty for training, as federal service for the purposes of his relative placement on the retention register. The presiding official found the determination on veteran's status to be proper and concluded that the agency's reduction in force was effected in accordance with 5 C.F.R. Part 351.

In the petition for review, the appellant contended that he had new evidence which would establish his entitlement to Veteran's Preference and an earlier service computation date. He submitted a copy of AGUZ form 606, dated June 19, 1980, signed by the Director, Retired Activities, U.S. Army Reserve Components Personnel and Administration Center, verifying the dates of appellant's membership and stating that all of those years “. . . are qualifying years for retirement.”

At the outset, the Board notes that a change in the appellant's service computation date would not have affected the outcome of his case. The record shows that all individuals in the appellant's competitive level who were not entitled to preference eligibility were reached for release. The appellant could only have competed successfully in the reduction in force if he had been entitled to Veteran's Preference. Any error in this regard, then, must be considered harmless.

The “new evidence” offered by the appellant in support of his claim to Veteran's Preference is simply his assertion that he is applying for a service-connected disability. Not only is it mere speculation that his application will be approved and that it would entitle him to Veteran's Preference, but, even if it were approved, the circumstances that existed at the time of the reduction in force would remain unchanged.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 3, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

LEE S. TENNYSON
v.
DEPARTMENT OF THE AIR FORCE

Docket No.
M-80-11

OPINION AND ORDER

This case, pending at the Board's Boston Field Office, is before the Members of the Board pursuant to the March 3, 1980 order of the Acting Chief Appeals Officer, certifying as an interlocutory appeal the agency's objection to the exercise of appellate jurisdiction by the presiding official.

I. FACTS: Appellant Tennyson held the position of Contract Negotiator, GS-11, at the agency's Hanscom Air Force Base, Bedford, Massachusetts. By letter of August 14, 1979, he was notified of a proposal to remove him from the service for "failure to meet three performance standards for the critical elements of (his) position." After receiving written and oral responses to the charges, the agency found them fully supported, and by letter dated November 2, 1979, informed appellant that he was to be removed, effective November 9, 1979. A Standard Form (SF) 52, Request for Personnel Action, was executed to implement the decision on November 5.

The record shows that appellant had several discussions with representatives of the agency's Civilian Personnel Office on November 7, 8, 9 and 13, and that on the latter date he signed an SF-52 indicating a desire to resign from the agency, effective November 9, noting:

> I have been advised by Maurice L. Fowler, Assistant Deputy for Contracting, Electronic Systems Division, that it is his decision to remove me for unsatisfactory performance which I believe is unjustified, not supported by the evidence, and not in accordance with the law. Mr. Fowler's adverse decision was based on his sole finding that I lack attention to detail and close accuracy.

A second form, SF-50, Notification of Personnel Action, was issued on November 26, effecting appellant's resignation in accordance with the terms stated on the November 13 SF-52. In addition, it should be noted that on November 9, appellant had signed an SF-2801, Application for Retirement, provided to him by the agency.

The agency has stated that, as a result of the discussions with appellant prior to the effective date of the removal, the "administrative processing of the termination action" was stopped on November 8, 1979, when a Personnel Specialist in the Civilian Personnel Office prepared an Air Force SF-1513, Punch Card Transcript, to accomplish that action. No SF-50 was issued to appellant as a result of the November 5 SF-52. However, there is no evidence that a written decision was made to cancel the removal before it became effective, and the record indicates that appellant was unaware that any cancellation decision had been made.

On November 16, 1979, appellant submitted to the Board's Boston Field Office a petition seeking to appeal from the removal action. The agency responded by stating that appellant had resigned his position on or before November 9, 1980, so that the Board lacked jurisdiction over the appeal.

In order to resolve the matter, a hearing was scheduled which was "limited to the sole question of whether appellant resigned as reported by the agency in the SF-50 dated November 26, 1979. No other issues will be addressed." That hearing was held on February 11, 1980. Prior to that date, the Office of Personnel Management (OPM) intervened in the case pursuant to 5 U.S.C. 7701(d)(1) and 5 C.F.R. 1201.34(b). It submitted a brief on the issue but declined to participate in the hearing. The presiding official then issued an Order dated February 11, 1980, in which he found that appellant had not tendered a resignation before the close of business on November 9, 1979; that his separation from the service by removal became effective at that time; that the SF-52 of November 13, 1979 was a nullity and of no effect due to the earlier discharge; and that on November 13, all that remained to process the discharge was the execution of an SF-50 memorializing the action. The SF-50 recording the resignation was ordered voided and in its stead one showing a separation by removal was to be issued.

The agency excepted to the presiding official's ruling on February 15, 1980, by filing a motion for certification of the issue as an interlocutory appeal. On February 25, 1980, appellant filed a "Motion in Opposition to Certification," and as noted above, on March 3, the Acting Chief Appeals Officer certified the question to the Board pursuant to 5 C.F.R. 1201.93(b).

While the case was pending before the Board, OPM once again petitioned for an opportunity to intervene. By Order dated April 9, 1980, the Board granted the motion, and OPM later filed a brief in support of the agency's position. The parties have submitted responses to OPM's brief.

II. ISSUE: The issues before the Board are whether the agency effectively cancelled the removal action on or before November 9, 1979, and whether the resignation submitted on November 13 is to be given retroactive effect.

III. DISCUSSION: As set out above, the record shows that appellant received a written decision stating that his removal would be effected on November 9, 1979, and that an agency personnel specialist took steps to stop that action from becoming effective by issuing a computer order that this be done. We find, however, that the presiding official correctly held, under the circumstances of this case, that there had been no effective cancellation of the removal action.

We so find for two reasons. First, there is no indication in the record that the personnel specialist had any authority to prevent the removal from becoming effective after it had been duly decided that it should occur. Absent action by a management official authorized to make the substantive decision cancelling the duly initiated removal action, the personnel specialist's preparation of a punch card instruction was a mere ministerial act with no authorized legal effect. Second, the record shows that appellant was not notified by any agency official that his removal had been rescinded. Absent notification by an authorized official, we find that the simple act of placing a new punch card into the computer was ineffective to stop the removal from becoming effective in accordance with the terms of the November 2 decision notice.

With respect to the second issue, we find that the November 13 resignation should not be given retroactive effect. The record clearly shows that appellant at all times wanted to appeal the removal action because he disagreed with the reasons relied on by the agency, and made this desire known to agency officials. There is also evidence in the record that he was not told that if he resigned from his position he would lose his right to appeal the removal action. In light of these facts and the circumstances set out above, the Board finds that the submission of the resignation on November 13 did not serve to defeat appellant's right to appeal from the removal action.

IV. CONCLUSION: Accordingly, we conclude that the presiding official correctly ruled that the removal action was effective on November 9, 1979, so that the resignation, which was not submitted until November 13, was of no effect.

The case is hereby remanded to the Boston Field Office for further development in accordance with the February 11, 1980 decision of the presiding official.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 3, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

RALPHFEL FOLEY v. VETERANS ADMINISTRATION	Docket No. DA075209105

OPINION AND ORDER

Petitioner filed an appeal with the Board's Dallas Field Office from an action by the Veterans Administration (VA) Medical Center, Houston, Texas, removing him from the position of Housekeeping Aid, effective November 9, 1979. The action was based on the charges of patient abuse and insubordination. The presiding official found that the preponderance of evidence supported the charge of insubordination, but did not support the charge of patient abuse. He, however, sustained the agency action as being for such cause as would promote the efficiency of the service.

In his petition for review, petitioner has alleged that the presiding official was biased and did not give him a fair hearing. Before the hearing, petitioner had requested the removal of the presiding official because of a decision in another case against the VA. The request was denied, and the petitioner has alleged that this action made the presiding official hostile. He has pointed to two alleged errors in the decision and referred to a verbal exchange at the hearing.

One error is a statement by the presiding official that petitioner did not make a reply to the proposed notice of removal. Petitioner has asserted that he replied orally, although he has not presented any evidence of such a reply. The second error is a date given on a written statement by one of the witnesses. Petitioner has not demonstrated how these errors show any bias on the part of the presiding official.

As for the reference to a "heated" exchange during the hearing between the presiding official and petitioner's representative, the discussion was on one action by the official sustaining an objection by the agency to a question by the representative. Petitioner's representative thought the question about pool playing in the ward was relevant to the charge of patient abuse, but the presiding official disagreed.

The Board in *Weaver v. Department of the Navy*, 2 MSPB 297 (1980) discussed the charge of bias and set out the criteria for review in such a case. It was established that an incorrect ruling alone was not sufficient to warrant a review of the record. *Weaver, supra* at 299. See also *In the Matter of King,* 1 MSPB 144 (1979), and *Oliver v. Department of Transportation* 1 MSPB 368 (1980). Applying this standard to this case, petitioner has not presented any evidence of bias, other than an allegedly incorrect ruling. He has failed to state a reason for review of the record for bias. In fact, the Board notes that the presiding official showed fairness in finding some of the charges not sustained.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 6, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

WILLIAM S. McJUNCKINS
v.
DEPARTMENT OF THE TREASURY

Docket No.
NY075209007

OPINION AND ORDER

Appellant was removed from the position of Internal Revenu Agent, Internal Revenue Service, Manhattan District, New York New York, based on the charge of failure to safeguard an officia document, i.e., a tax return, in violation of agency regulations Appellant appealed to the Board's New York Field Office. Th presiding official issued an initial decision affirming the action and the appellant filed a petition for review.

The appellant's petition is based, in part, on the allegation tha the presiding official erroneously interpreted a regulation. Spe cifically, the appellant contends that the agency improperl excluded words from the charge against the appellant, and thi caused the presiding official to misinterpret the charge and i correctly find that it was supported by a preponderance of th evidence.

The appellant was charged as follows:

> *Failure to Safeguard Official Documents, in Violation IRM 0735.1—7, Section 226.2,* which states, in part: "Em ployees shall be held responsible for the loss, disappearanc or theft of official documents . . . Recovery of the doc ments may not necessarily be a mitigating circumstan after the loss.

A review of the pertinent portion of Section 226.2 revea that the agency omitted the words "when attributable to neg gence or carelessness." This omission, however, does not chan the fact that the appellant is charged with violating the ent section.

The presiding official considered the fact that this language w omitted and concluded that it was not harmful procedural err The appellant points out, however, that he then ruled that agency had shown by a preponderance of the evidence ". . . th appellant lost the subject return" without making any finding w regard to negligence or carelessness.

In fact, the record shows that the agency presented no evide that the loss of the return was attributable to the appella negligence or carelessness. The evidence establishes that the return is missing and it was last charged to the appellant. The appellant testified that he knew of the agency's security procedures and that, to the best of his recollection, he always followed them.

The Board finds that the omission of a portion of the charge significantly misled the presiding official as to the evidence required to meet the agency's burden of proof. In the Board's judgment, the agency failed to meet its burden with respect to the portion of the charge which assessed culpability.

Accordingly, the petition for review is GRANTED, and the decision of the presiding official is REVERSED.

The agency is hereby ORDERED to CANCEL the removal action and furnish evidence of compliance with this Order to the Field Office within ten (10) days of the date of this Order.

This is a final Order of the Merit Systems Protection Board in this appeal. 5 C.F.R. 1201.113(c).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this Order.

For the Board:

Ersa H. Poston.

Washington, D.C., *October 6, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ALBERT NEWBY, JR.
v.
DEPARTMENT OF THE NAVY

Docket No.
PH075209039

OPINION AND ORDER

Petitioner was removed, effective July 19, 1979, from his position of Welder, Department of the Navy, Norfolk Naval Shipyard, Portsmouth, Virginia. The agency's decision to remove was based on charges that petitioner refused to carry out the orders of a supervisor and that he threatened the life of another, as well as petitioner's past disciplinary record.

Petitioner submitted an appeal to the Board, and, pursuant to his request, a hearing was scheduled by the presiding official. The record indicates that notice of the hearing was sent to petitioner, who failed to appear accordingly. Consequently, the agency was permitted to present its case, and the appeal was decided on the bases of the evidence adduced at the hearing and on the record. The presiding official found the charges sustained by a preponderance of the evidence.

Petitioner now seeks review of the initial decision, simply alleging that he was unable to appear at the hearing because of a court appearance on the same date.

By letter dated August 6, 1979, which acknowledged receipt of the petition for appeal, petitioner was specifically advised by the Field Office of the Board's policy to decline requests for continuances or extensions except upon a showing of good cause, pursuant to 5 C.F.R. 1201.12. He was also advised, in accordance with 5 C.F.R. 1201.51, that motions for postponement of a hearing must be accompanied by an affidavit. Petitioner has not alleged that he did not receive either the August 6 letter or the notice of hearing. Nevertheless, petitioner failed to submit a request for a continuance on the ground of the alleged court appearance, or on any other ground. He merely disregarded the Field Office's warning. On review, he advanced no reason for failing to notify the Field Office of the apparent conflict.

Since petitioner failed to request a continuance or to inform the Field Office of his inability to appear, there was no basis on which a finding of good cause warranting a continuance under

5 C.F.R. 1201.12 could have been made by the presiding official, and the appeal was properly decided on the basis of the evidence presented by the agency at the hearing and on the record. Therefore, the petition fails to meet the criteria for review under 5 C.F.R. 1201.115.

Accordingly, the petition for review is hereby DENIED.

This is a final decision of the Merit Systems Protection Board. Petitioner is hereby advised of his right to appeal this decision to the United States Court of Claims, or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within 30 calendar days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 6, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KEVIN P. ROSE
v.
DEPARTMENT OF THE NAVY

Docket No.
SF075209069

OPINION AND ORDER

Kevin P. Rose, appellant, was discharged by the Department of the Navy, respondent, for a third offense of unauthorized absence. After an unsuccessful appeal to the Board's San Francisco Field Office, the appellant's attorney petitioned the Board to review the initial decision. It is asserted in the petition that there is new material evidence available, which was not previously available, and that the decision of the presiding official was based on an erroneous interpretation of statute or regulation.

The new material evidence which was referred to in the petition is the testimony of the director of a rehabilitation program in which the appellant participated. While it is alleged that the witness was not previously available, we conclude that the asserted evidence does not meet the criteria for granting a petition.

The Board may grant a petition for review when it is established that there is new and material evidence available that was not available when the record closed despite due diligence. 5 C.F.R. 1201.115(a). The record does not reflect that any request was made by appellant's attorney to subpoena the director, nor did he request a postponement in order to obtain the witness. Additionally, a witness unable to appear at a hearing can be deposed pursuant to 5 C.F.R. 1201.75. We conclude that appellant has not established that the testimony was not available despite due diligence. Further, the evidence was not "new," in that appellant knew the potential witness and, in fact, obtained a letter from him to establish the legitimacy of appellant's absence. See *Powell v. Department of the Interior,* 3 MSPB 35 (1980) at 37.

The other argument set forth in the petition is that since appellant was originally granted leave without pay and since he returned to work within the time period specified, the presiding official erroneously held that appellant violated the leave provisions. This argument, in effect, contests the findings that the appellant was granted leave without pay to cover his period of participation in a rehabilitation program, that the appellant left the program on May 9, 1979, and from May 10, 1979, he was absent without authorization. These findings are supported by a preponderance of the evidence, however, and while the appellant would have the evidence interpreted otherwise, he points to nothing in the record which refutes the reasoning of the presiding official. See *Weaver v. Department of the Navy,* 2 MSPB 297 (1980).

The petition for review is, accordingly, DENIED. This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 6, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

NEMOURS T. BOURG v. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT	Docket No. DC075299050

OPINION AND ORDER

The Department of Housing and Urban Development (the agency) and the Office of Personnel Management (OPM) have petitioned for review of the award of attorney fees by the Washington, D.C. Field Office of the Merit Systems Protection Board in this appeal. The presiding official reversed the agency's demotion of Nemours T. Bourg (the appellant) based on his alleged inability to supervise his subordinates properly, finding that the agency failed to follow a mandatory internal rule requiring a supervisor to attempt to improve an employee's performance and then to attempt reassignment to a comparable position prior to recommending dismissal. The presiding official awarded attorney fees in an addendum decision, concluding:

> I find the agency's action to be clearly without merit because the agency took the action without regard for the clear mandate of its regulations. I also find, as an independent finding, that attorney fees are warranted in the interest of justice. Appellant's rights were violated by the agency's violation of the clear mandate of its regulations.

Both the agency and OPM have asserted that the award of attorney fees was erroneously made.

The presiding official's finding that attorney fees are warranted in the interest of justice lacks an adequate analysis of the requirements for such an award, as set forth and examined in detail in our recent opinions in *Allen v. U.S. Postal Service,* 2 MSPB 582 (1980), *O'Donnell v. Department of the Interior,* 2 MSPB 604 (1980), and *Kling v. Department of Justice,* 2 MSPB 620 (1980).[1] *See* 5 U.S.C. 7701(g)(1) and 5 C.F.R. 1201.37(a).

Moreover, the presiding official's conclusion that the agency's procedural error warranted an award of fees is contrary to our determination that such a conclusion must be based on more than "harmful" procedural error such as merely suffices to require reversal of the agency action under 5 U.S.C. 7701(c)(2)(A). *See Allen,* at 593 n. 36. Otherwise, the "interest of justice" standard would be read out of the statute whenever the employee satisfies the "prevailing party" requirement by prevailing on grounds of the agency's procedural error.

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[1] We find it unnecessary, at this time, to reach the subsidiary issues raised by the agency and OPM in their petitions because those issues have been resolved in *Allen, O'Donnell,* and *Kling.*

Accordingly, the addendum decision awarding attorney fees in this appeal is hereby REVERSED.

This is the final decision of the Merit Systems Protection Board. The appellant is hereby notified of the right to seek judicial review of the Board's action as specified at 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 7, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDSEL L. CORPE
v.
OFFICE OF PERSONNEL MANAGEMENT

Docket No.
AR083190006

OPINION AND ORDER

The Petition of March 5, 1979, requesting the Merit Systems Protection Board to reopen and reconsider this case, is denied.

In reviewing requests to reopen such appeal cases, arising under 5 CFR Part 831 prior to January 11, 1979, the Board is required to apply the review standards set forth in 5 CFR 772.310 and 772.312 (1978). After a careful review of the information submitted by the appellant, the Board finds that none of the regulatory criteria have been met to warrant reopening of the decision issued by the Board's Office of Appeals Review on March 8, 1979.

The Board finds that the new evidence submitted in support of appellant's claim for retirement service credit under the provisions of 5 USC 8336(c), pertaining to employment periods from August 28, 1966 through November 30, 1968, and from June 13, 1971 through June 18, 1977, is insufficient to show that the prior decision which denied service credit for those periods was in error. During those periods, the appellant served in the administrative positions of Deputy Forest Supervisor, and Forest Supervisor. The latter position initially was found not entitled to general coverage under 5 USC 8336(c) by the former U.S. Civil Service Commission on March 26, 1975, and the Deputy position also is not covered as it involved similar duties to those performed by the Forest Supervisor. The Commission recognized that in some cases an employee's duties might not be fully described in his official position description, and if it were established that an employee actually performed duties which would be covered under the definition of a "firefighter" he would receive appropriate credit even if the position as it was officially described would be excluded from general coverage. However, the appellant's submissions have not demonstrated any significant difference between the duties he actually performed and those contained in the official position description for the Forest Supervisor position. In addition, while he has provided evidence that his previous firefighting experience was a basis for his initial selection for the position of Deputy Forest Supervisor, he has not demonstrated that experience as a firefighter was a basic qualification requirement for the position, a demonstration which was a requirement for continuing coverage under the provisions of 5 CFR 831.904 (b) (3) (ii).

Similarly, the new evidence submitted in support of the appellant's claim for retirement service credit for a period from December 1, 1968 through June 12, 1971, when he was on assignment with the International Forest Service, is not sufficient to show probable error in the decision to deny credit for that service under the provisions of 5 USC 8336(c). Title 5, Code of Federal Regulations, section 8331(21), defines a "firefighter" as:

> an employee, the duties of whose position are primarily to perform work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment, including an employee engaged in this activity who is transferred to a supervisory or administrative position.

The new evidence supplied by the appellant relating to his duties while on assignment to the International Forest Service shows that, while he had important consultative responsibilities relating to "slash and burn agriculture" and was required to have an intimate knowledge of fire behavior, the primary duties of that position were not directly connected with the control and extinguishment of fires.

Appellant's request for an exception to the break-in-service provisions of the regulations, which would have the effect of considering his employment record as continuous without intervention of the assignment with the International Forest Service, if such exception were granted, is not a matter for the Board's initial consideration inasmuch as the Office of Personnel Management, as administrator of the provisions of the Civil Service Retirement Act, would have original jurisdiction over such a request. There is no evidence in the record that either the Office of Personnel Management or the former Civil Service Commission ever acted upon such a request from the appellant.

Accordingly, the Board finds no basis for changing the previous decision of the Office of Appeals Review in this case, and the request to reopen this case is, therefore, DENIED.

There is no further right of administrative appeal from a decision of the Merit Systems Protection Board on a request for reopening. This case is considered to be closed in this office since all administrative appeal rights have been exhausted. Any further remedy available lies in the court system.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 7, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

HAMILTON D. HILL
v.
DEPARTMENT OF AIR FORCE

Docket No.
AT075209252

ORDER

The agency in its petition for review of the reversal of its removal of appellant contends that the initial decision misinterpreted the requirements of 5 C.F.R. 1201.56(a)(1) with respect to the appropriate burden of proof in this case. This raises an issue cognizable under 5 C.F.R. 1201.115(b).

Appellant was removed for alleged failure to request leave according to established procedures. Under 5 U.S.C. 7701(c)(1), the agency always has the burden of proving its case. In a case other than one based on unacceptable performance, the agency must prove its case by the higher standard of a preponderance of the evidence. 5 U.S.C. 7701(c)(1)(B). *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980) at 499-509. These statutory provisions are reflected in the Board's regulations at 5 C.F.R. 1201.56 (a)(1)(ii).

The presiding official applied the correct burden and standard of proof when finding that the record did not support the charges by a preponderance of the evidence.[1]

The petition for review is GRANTED. The initial decision is AFFIRMED.

This is a final decision of the Merit Systems Protection Board. The initial decision will become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 7, 1980*

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[1] There was no hearing; the agency relied upon its notice of proposed removal and subsequent decision in support of its case. Statements contained in proposal and decision notices are merely allegations and do not constitute evidence which may be used by an agency to prove its case.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VERA HURT v. DEPARTMENT OF HEALTH AND HUMAN SERVICES	Docket No. CH531D09007

OPINION AND ORDER

Vera Hurt, appellant, was informed on April 24, 1979 that she would not receive a within-grade increase in salary. After a reconsideration decision sustained the denial, appellant appealed to the Board's Chicago Field Office. A hearing was held in the matter, and an initial decision which affirmed the action was subsequently issued. Appellant has petitioned the Board to review the initial decision.

In the petition, a number of procedural and substantive errors were alleged. The agency responded to the petition, refuting the errors alleged and questioning the sufficiency of the petition. In order to resolve the issues raised, we will consider the allegations in detail.

The first error alleged is that the agency "misapplied and misinterpreted the Civil Service Reform Act of 1978 (CSRA) in that critical elements were established and used denying the within grade increase." Additionally it is noted that the agency did not negotiate with the union when making these critical elements. The agency responded that the denial of appellant's increase was based on the essential elements of her position, as evidenced by her position description.

The presiding official found that the agency was confused about the difference between a "critical element" and an "essential element," but he also noted that the appellant had been informed verbally and in writing that her work was deficient and that she had been given ample opportunity to improve. He concluded that the agency's confusion as to the exact definition of the terms did not harm appellant.

The question of the relationship of an acceptable level of competence (ALOC) determination, made under 5 U.S.C. 5335, and the performance appraisal systems established under 5 U.S.C. 4302, has been addressed in *Parker v. Defense Logistics Agency,* 2 MSPB 297 (1980). In that case, we found that determinations made under section 5335 are included among the personnel actions which must be based upon section 4302 performance appraisals. *Id.* at 20; see 5 C.F.R. 430.203(i). The connection of ALOC determinations to a performance appraisal system, however, is to be effective only when the agency establishes a section 4302 appraisal system. *Id.* at 24. Pending establishment of a 4302 system, an agency is to follow the provisions of section 5335 and 5 C.F.R. 531.407.

In the case before us, the agency, although using the terms "critical" and "essential" elements interchangeably, did not base its ALOC determination on an approved appraisal system; rather, it relied on the appellant's position description. The appellant was aware that the action was not based on a 4302 system, so that it appears that the use of the term "critical" did not mislead her as to the nature of the determination. Further, she has not shown that any prejudice to her appeal has resulted from use of the term. We find that the action was properly taken under section 5335 and that the presiding official's decision in this regard was not based on an erroneous interpretation of statute or regulations.

In *Parker,* we also held that ALOC determinations had to be supported by substantial evidence. While the presiding official applied a preponderance of the evidence standard to the agency's case, the error was harmless since he found that the agency met the higher standard.

The appellant had requested the presiding official to impose sanctions on the agency for not fully complying with certain information requests. See 5 C.F.R. 1201.43 and Appellant's Exhibit A. The presiding official denied the motion; he ruled that questions 1 and 2 were irrelevant, but that question 3 was relevant, and that questions 4–11 were overly broad and of questionable relevancy. However, he ruled that appellant could pursue the questions if the scope of the questions was narrowed and that he would rule on specific questions when objections were raised during the hearing. In the petition, appellant argued that the agency's failure to produce the information, and the presiding official's refusal to impose sanctions, prevented her from comparing her work performance to other employees nation-wide, and that she was prevented from gaining information on the performance standards.

Review of the agency's response to appellant's questions shows that the agency, in its initial response, answered the questions with the information it had. See Agency Exhibit 1. The refusal of the presiding official to require the agency to answer further, except when the scope of the questions was narrowed, was proper. Overbroad questions produce unnecessary delay, and in this case were not relevant to the issue of appellant's work performance.[1] We find no error under 5 C.F.R. 1201.43.

The agency relied on appellant's job performance to establish that her work was not at an acceptable level of competence. She had been verbally counseled about her work performance and what was expected of her. She had been in the position a number of years and the argument that she was unaware of acceptable performance standards is specious. The agency proved by substantial evidence that appellant was aware of what constituted, but failed to perform at, an acceptance level of competence.

The final allegation of error is that the agency based its determination on only two and half months of the year waiting period. This argument is factually incorrect. Appellant believes that the initial agency decision to deny the increase supports this allegation. While the decision did state that the decision was based on a full review of appellant's work from January 1979 to April 1979, it was made clear that appellant's performance prior to that date was also considered. It is not error for an agency to carefully review an employee's work for a limited period of time, and to subject the employee to the usual review process during the rest of the waiting period. Nor has appellant shown how she may have been harmed in this respect.

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 7, 1980*

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[1] An ALOC determination is required to be based on the essential requirements of the employee's position. 5 C.F.R. 531.407. Further it was appellant's performance and not that of other employees which was at issue before the presiding official.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

DIANE B. JOVANOVICH
v.
VETERANS ADMINISTRATION

Docket No.
SE075209045

OPINION AND ORDER

The appellant resigned from the position of Clerk (Typing) with the Veterans Administration, Seattle, Washington effective October 15, 1979. She then appealed to the Board's Seattle Field Office alleging, in essence, that she was forced to resign her position because of duress and harrassment. The presiding official denied appellant's request for a hearing, finding on the administrative record and review of appellant's written submissions that her resignation was in fact voluntary. She therefore dismissed the action as one not subject to the Board's appellate jurisdiction.

An appellant has a right to a hearing on an appeal filed with the Board. See 5 U.S.C. 7701(a) (1). Since an involuntary resignation is in effect a removal, a non-frivolous allegation of the involuntariness of a resignation warrants a hearing on that issue. See *Paroczay v. Hodges*, 219 F. Supp. 89 (D.C. D.C. 1963); *Bell v. Groak* 371 F.2d 202, 204 (7th Cir. 1966); *Goodman v. United States*, 358 F.2d 532, 533 (D.C. Cir. 1968), *Dabney v. Freeman*, 358 F.2d 533, 535 (D.C. Cir. 1965); *Farrell v. Gordner*, 279 F. Supp. 427 (E.D. Pa. 1969); *Spiegel v. Department of the Army*, 2 MSPB 307 (1980).

In light of these decisions, the question before the presiding official was not whether appellant's resignation was in fact voluntary, but rather, whether a non-frivolous allegation of involuntariness had been raised. The appellant's allegations of harrassment and duress by various supervisory personnel in her agency, and the language of the resignation which indicated that appellant was "being forced to resign," raise issues of fact which cannot be labeled as frivolous. Moreover, there is a serious question as to whether the appellant received proper assistance and guidance on her resignation. Considering these issues, appellant's lack of counsel in filing her appeal, and her written request for a hearing, it was error for the presiding official to decide the issue of voluntariness without affording the appellant a hearing on that issue. 5 C.F.R. 1201.115(b).

The burden will be upon the appellant to show by a preponderance of the evidence that the agency made conditions so unbearable for her that she was, in effect, coerced into resigning, or that the agency did not properly advise and assist her so that she resigned without understanding her rights. See *McCormack v. United States*, 204 Ct. Cl. 371 (1974). The criteria for deciding the issue are set forth in *Pitt v. United States*, 420 F.2d 1028, 190 Ct. Cl. 506 (1970); *Dabney v. Freeman, supra; Fruhauf Southwest Garment Co. v. United States*, 126 Ct. Cl. 51, 62, 111 F. Supp. 945, 951 (1953).

The presiding official, in her initial decision, also raised the issue of timeliness of the appeal. Although the case was not decided on the issue of timeliness we note that there is no indication that the appellant was informed that if her resignation was involuntary, she had a right of appeal and a limited time in which to exercise that right. Thus, appellant's delay in appealing is excused for good cause pursuant to 5 C.F.R. 1201.12. See *McCormack v. United States, supra, and Spiegel v. Department of the Army, supra.*

Accordingly, the petition for review is GRANTED, the initial decision is hereby REVERSED, and the case is REMANDED for the purpose of affording appellant a hearing on the issue of the voluntariness of her resignation and for such further action as may then be appropriate.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 7, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ALGIE R. LEWIS v. DISTRICT OF COLUMBIA GOVERNMENT	Docket No. DC035109026

ORDER

This matter is before the Board on a petition for review of the initial decision issued April 18, 1980, denying Mr. Lewis's February 25, 1980, petition for compliance with a decision issued January 15, 1980, by the Board's Washington Field Office. The January 15, 1980, decision on the merits reversed the District of Columbia government's reduction in force action taken against petitioner. The Field Office denied the petition for compliance on the basis that petitioner had not raised matters within the Board's purview. The gravamen of appellant's petition for compliance and the subsequent petition for review of the denial thereof is respondent's failure to pay the petitioner the back pay to which he was entitled under the January 15, 1980 decision.

The agency response dated June 20, 1980, indicates that it rectified this failure on June 19, 1980, and petitioner should be now in receipt of the monies in question. Inasmuch as it appears the agency is now in compliance with the Board's January 15, 1980 decision, the petition for compliance has been rendered moot.

Accordingly, the petition for review is DENIED.

This is the final order of the Merit Systems Protection Board in this appeal. Appellant is notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after the appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 7, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

NORMAN MILLER
v.
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

Docket No.
SF531D09010

OPINION AND ORDER

Mr. Norman Miller appealed from a reconsideration decision of the Social Security Administration which sustained a negative acceptable level of competence determination and decision to withhold a within-grade increase. In the initial decision dated March 28, 1980, the presiding official found that the agency action was supported by substantial evidence and affirmed the agency action, and informed appellant that it would become a final decision of the Merit Systems Protection Board on April 29, 1980, unless a petition for review was filed with the Board within 35 calendar days of issuance of the decision.

In his petition for review, dated April 25, 1980, appellant requested an extension of 30 days to "secure new and material evidence that was not available when the record was closed." The Board granted an extension until June 2, 1980. To date, however, no new evidence has been submitted. Accordingly, the Board finds that appellant has failed to prosecute his petition. *See Bennett v. Department of the Navy*, 2 MSPB 93 (1980).

Therefore, the petition for review is DISMISSED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 7, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

CATHERINE E. MOONEY v. OFFICE OF PERSONNEL MANAGEMENT	Docket No. PH083109001

OPINION AND ORDER

Appellant was found ineligible for a Civil Service Retirement System annuity by the Retirement and Insurance Program Compensation Group of the Office of Personnel Management (OPM). This determination was based upon a finding that appellant had accumulated insufficient creditable service to qualify for the annuity. Appellant then appealed the OPM decision to the Board's Philadelphia Field Office, itemizing her employment with the Federal Government for a period of approximately ten (10) years. The presiding official affirmed the decision of the OPM finding that seven (7) of the appellant's ten (10) years of "Federal" government employment earned with the New York Board of Education under the Works Progress Administration (WPA) was not creditable federal employment as set forth in 5 U.S.C. 2105 and 5 U.S.C. 8332. The presiding official therefore found that the appellant had failed to accumulate the five (5) years of creditable service required for Civil Service Retirement System annuity eligibility and affirmed the OPM decision.

The issue to be determined by the Board is whether appellant was an employee of the Federal Government, and thus entitled to retirement benefits during the period of her employment with the Works Progress Administration.

Upon review of the record in this matter we find no basis on which to reverse the decision of the presiding official. A federal employee has been defined to include only persons who are (a) engaged in the performance of a federal function, (b) are appointed or employed by a federal official and (c) are under the supervision and direction of a federal officer. See 5 U.S.C. 2105; *Jankovic v. United States* 384 F. Supp. 1355 (D.D.C. 1974); and *Stapleton v. Macy, et al.* 113 U.S. App. D.C. 78, 304 F.2d 954 (C.A.D.C. 1962). Additionally, the Court indicated in *Adelstein v. Macy*, 265 F. Supp. 171 (E.D.N.Y. 1967) that employment with the Works Progress Administration was not creditable toward retirement from Civil Service employment with the exception of certain administrative positions. The record does not indicate nor does the appellant allege that the position she held falls within the ambit of the exception noted above.

In order to be eligible for an annuity appellant must establish that she has accumulated five (5) years of creditable service as set forth in 5 U.S.C. 8332 and 5 U.S.C. 8333. The appellant has alleged that she has accumulated ten (10) years of creditable service. However, the period of employment alleged from 1938 to 1945 with the Works Progress Administration, as discussed above, cannot be credited toward retirement from the Civil Service System. The remaining three (3) years of Federal employment do not meet the five (5) years minimum creditable service required by statute.

The Board therefore finds that the initial decision was not based on an erroneous interpretation of statute or regulation. 5 C.F.R. 1201.115(b).

Accordingly, the petition for review is DENIED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals for the appropriate circuit or the U.S. Court of Claims within 30 days of receipt of this decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 7, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

BARNEY RAY
v.
DEPARTMENT OF AIR FORCE

Docket No.
AT035109014

OPINION AND ORDER

Appellant was reassigned from the position of Janitor, WG-2, to the position of Laundry Worker, WG-2, as a result of a reduction-in-force action (RIF) taken by the Department of Air Force, Keesler Air Force Base, Mississippi, effective September 15, 1979. On appeal, the appellant sought to have the action reversed alleging that an employee with lower retention standing was improperly retained in his competitive level. The presiding official found that the appellant had been released from his competitive level when an employee in a lower retention group was retained. She ruled, however, that this action was a procedural error not harmful to the appellant because there were two employees in his competitive level who would have been retained before him. Therefore, she affirmed the agency's action.

The salient facts as presented by the appellant were not contested by the agency. On July 6, 1979, appellant, a category I-A employee (career tenure with veterans preference), was given notice of a RIF to be effective September 15, 1979. In lieu of separation, he was offered a reassignment to Laundry Worker, WG-2, which he accepted. On September 14, 1979, one of the twelve employees retained in the Janitor competitive level retired. At this point, the agency offered the position to the highest ranking employee who had been reassigned to a position at a lower representative rate of pay than the rate obtained while occupying the Janitor position. In effect, the agency canceled the RIF notice to this employee, who was in category I-B (career tenure without veterans preference). Thus, the agency released an employee of higher retention standing, the appellant, while retaining an employee of lower retention standing in the competitive level.

When competitive positions described in 5 C.F.R. Part 212 are affected by a RIF, employees are released from their competitive levels according to the provisions of 5 C.F.R. 351.601. Employees are released from their competitive levels in the inverse order of their "retention standing". 5 C.F.R. 351.602. Accordingly, the

Board finds the agency's release of the appellant from his competitive level while retaining a lower standing employee was contrary to regulations.

Although, the presiding official found this action by the agency to be procedurally defective, but not harmful, the Board in *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980) found that the "(p)roper determination of an employee's entitlement under the RIF regulations is thus a substantive right of the employee not merely a procedural requirement subject to the harmful error standard of (5 U.S.C.) section 7701(c)(2)(A)." [1] In making this determination, the agency has the burden of proof to establish that there was a properly conducted RIF satisfying the requirements of the applicable regulations.[2] Therefore, the Board finds that the presiding official erred in her determination that the agency's action was proper and that the appellant's entitlements had not been violated.[3] Since this is the case, the question of harmful error need not be reached.

Accordingly, it is ordered that:

1. The initial decision, dated December 13, 1979, is REVERSED;
2. The Department of Air Force is directed to cancel the personnel action reassigning Barney Ray, and thereupon to accord him the rights to which he is entitled under 5 C.F.R. Part 351;
3. The agency is hereby ORDERED to furnish evidence of compliance with paragraph (2) of this order to the Field Office within ten (10) days of the date of this order.

This is the final decision of the Merit Systems Protection Board in this case. Appellant is hereby advised of his right to appeal this decision to the United States Court of Claims or the appropriate circuit of the United States Court of Appeals, provided such appeal is filed within thirty (30) days from receipt of this decision by appellant.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 7, 1980*

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[1] *Losure*, p.8, n. 5

[2] Ibid.

[3] The Board does note, however, that the presiding official decided this case without the benefit of the Board's guidance in *Losure* since it was issued after the initial decision in this case.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

William Woodcock
v.
Social Security Administration

Docket No.
PH531D09023

Order

The Initial Decision in this proceeding was issued on March 14, 1980, to become effective April 18, 1980, barring the Board's reopening or the filing of a petition for review. The Initial Decision sustained the agency's denial of appellant's within-grade increase. The Board has not reopened this case. Therefore, appellant had until April 18, 1980, to file his petition for review.

The petition for review was received by the Board on April 21, 1980, out of time. Appellant was advised of the untimeliness and given an opportunity to explain. No explanation or evidence as to the timeliness of the filing has been received.

Moreover, the petition does not meet the criteria for review set forth at 5 CFR 1201.115.

Therefore, the petition for review is DISMISSED.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 CFR 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

Robert E. Taylor,
Secretary.

Washington, D.C., *October 7, 1980*

See amended Order, October 17, 4 MSPB 24 (1980).

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THOMAS F. KENNEDY v. UNITED STATES DEPARTMENT OF TREASURY	Docket No. PH531D09009

OPINION AND ORDER

Appellant, Thomas F. Kennedy, filed a petition for review of the initial decision which sustained the denial by the Internal Revenue Service of a within-grade step increase in his salary.[1] He contended that due to a lack of established performance standards for his position, the agency could not "hold an employee responsible for performance", and that the agency's own procedures require the establishment of performance standards before an employee's performance can be determined to be unsatisfactory.

It is provided in 5 C.F.R. 1201.115 that the Board may grant review when there is new and material evidence available which was not available when the record on appeal closed, or when the decision of the presiding official is based on an erroneous interpretation of statute or regulations. The petition satisfies neither of these criteria.

As the presiding official found, the agency informed appellant of the bases for the denial of the within-grade salary increase, as required by 5 C.F.R. 531.407 (c) (3) (i), and such denial was based on the essential requirements of appellant's position, as required by 5 C.F.R. 531.407 (c) (2) (i), even though there were no specific additional "standards" identified by the agency. There is no requirement that an agency must have adopted performance appraisal standards pursuant to 5 U.S.C. 4302 before denying a within-grade increase. *Parker v. Defense Logistics Agency,* 1 MSPB 489 (1980). Further, we find no evidence of harmful error in connection with the manner in which the agency specified the bases for its denial of the within-grade increase. 5 U.S.C. 7701 (c) (2) (A) and 5 C.F.R. 1201.56 (b) (1).

The appellant also argued in the petition that a memorandum dated February 8, 1978, issued by the Chief, Personnel Branch, required the agency to provide appellant with performance standards. The memo informs managers of the proper procedures when considering a within-grade increase. As found by the presiding official, the agency informed appellant why he was not being recommended for a within-grade increase in his salary, as required by 5 C.F.R. 531.407(b)(2). Nothing in the February 8, 1978 memorandum requires a manager to do more than required by that regulation.

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[1] 5 U.S.C. 5335 authorizes the award of periodic step increases to employees whose work is "of an acceptable level of competence."

Although the issue was not raised in the petition, consideration of the initial decision reveals that the presiding official applied a preponderance of the evidence standard of proof to the agency's case. This is an erroneous interpretation of the evidentiary standard applicable in this case, and therefore the Board reopens the case on its own motion to address this issue.

We addressed the question of the proper evidentiary standard in cases processed under 5 C.F.R. Part 531, Subpart D, in *Parker v. Defense Logistics Agency, supra*. The question in *Parker* was whether 5 U.S.C. 7701(c)(1)(A) or (B) should be applied to a step increase denial.[2] After considering the legislative history in detail, we concluded that "application of the substantial evidence standard in ALOC (step increases) cases is clearly more consonant with the statutory purpose, since that standard is a lesser departure than the heavier preponderance standard from the (prior) arbitrariness test." *Id.* 504. It was therefore concluded that appeals under 5 U.S.C. 5335(c) fall within 5 U.S.C. 7701(c)(1)(A), the substantial evidence standard. Accordingly the presiding official applied the wrong evidentiary standard in this case.

Although the presiding official applied the incorrect standard of proof, we find no evidence of harmful effect on appellant's case and will therefore modify instead of reversing the decision.[3] The Board's definition of the two standards of proof provided in 5 U.S.C. 7701(c)(1) makes it clear that the preponderance standard imposes a higher burden. 5 C.F.R. 1201.56(c)(1) and (2). Therefore, application of the preponderance standard was an added burden on the agency, not appellant.

Accordingly, the initial decision is modified in regard to the standard of proof applicable in this case, and, as modified, is AFFIRMED.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

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[2] Section 7701(c)(1)(A) provides for a "substantial evidence" standard in actions based on "unacceptable performance described in section 4303." Section 7701(c)(1)(B) provides for a "preponderance" standard "in any other case."

[3] In any case received by the Board, the Board may among other things, affirm, reverse, remand, modify or vacate the decision. 5 C.F.R. 1201.116.

For the Board:

Ersa H. Poston.

Washington, D.C., *October 8, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROBERT COMPTON v. DEPARTMENT OF ENERGY	Docket No. SL035109001

OPINION AND ORDER

I. BACKGROUND

The appellant, Robert Compton, petitioned the St. Louis Field Office of the Merit Systems Protection Board for appeal of his separation by reduction in force from the position of Program Analyst, GS-345-12, with the agency, the Department of Energy. He alleged that the agency violated his rights by improperly structuring his competitive level and his competitive area.

In an initial decision issued on December 11, 1979, the presiding official found that the appellant's competitive level was properly established, even though the appellant's position was the only one within the competitive area. He found, however, that the agency failed to meet its burden of proving that the appellant's competitive area was properly established. Concluding that the improper establishment of a competitive area constituted harmful error in a reduction in force, the presiding official reversed the appellant's separation.

In its petition for review of the initial decision, the agency contended that the presiding official misinterpreted the regulatory requirements for establishing a competitive area and for proving harmful error. The appellant took issue with this contention in his response to the petition. We hereby GRANT the petition for review.

II. DISCUSSION

Agencies must establish competitive areas, in which employees compete for retention during a reduction in force, in accordance with the following regulation:

> The standard for a *competitive area* is that it include *all or that part of an agency in which employees are assigned under a single administrative authority*. . . . A competitive area in the field service meets this standard when it covers a field installation in the local commuting area.

5 C.F.R. 351.402(b). (Emphasis added.)

In applying this standard based on authority to assign employees, the presiding official concluded that the regional administrator was the single administrative authority for the field installation of the agency in the commuting area of Kansas City, where the appellant was employed, rather than the Economic Regulatory Administration (ERA) component of the agency in that commuting area, as established by the agency.

In support of its petition, the agency argued that this conclusion was based on only one pertinent factor—the personnel office for the field installation appeared to be under the agency's regional administrator and not under the head of ERA. The agency urged that the presiding official failed to consider other factors establishing that the agency's structure was such that ERA constituted a single administrative authority within the Kansas City commuting area.

Our review of the record indicates that the agency introduced extremely little evidence to support its separation action. During the hearing before the presiding official, the agency waived its right to present direct testimony, limiting its case to rebuttal testimony. We conclude from the evidence of record that the presiding official did not err in finding as follows:

> There is no indication in the record that the head of ERA has appointing authority as distinguished from the authority of the Regional Administrator. Accordingly, the expectation that employees in ERA are assigned under a single administrative authority is not shown in the case record. I find no basis for concluding that ERA employees are independent from the Region VII Regional Director. . . . The testimony of the agency witness indicated that the appointing authority extended to all four major organizational entities in Region VII (Tr. 21).

Initial Decision at 3. The agency simply did not meet its burden of proof. *See Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980) at 365.

Where the agency has not met its burden of proof in support of its action, as in this appeal, the action may not be sustained. 5 U.S.C. 7701(c). Consideration of the affirmative defense of harmful error is unnecessary under those circumstances. *See* 5 C.F.R. 1201.56. Thus, though not prejudicial, the presiding official's consideration of harmful error in this case was inappropriate.

III. CONCLUSION

Accordingly, with the excision of the first paragraph on page four (4) which discusses harmful error, the initial decision dated December 11, 1979, is AFFIRMED. The agency is hereby OR-

DERED to cancel the appellant's separation by reduction in force and to furnish the Board's St. Louis Field Office with a copy of the official Notification of Personnel Action documenting compliance with this order of the Board, within ten (10) calendar days of receipt of this decision.

The appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) calendar days after the appellant's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., ***October 8, 1980***

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

WALLACE M. MAYO v. U.S. POSTAL SERVICE	Docket No. PH075209009

OPINION AND ORDER

The initial decision of the presiding official affirmed the agency's decision to separate the appellant for absence without leave (AWOL). 5 U.S.C. 7701(e) (i) provides, in pertinent part, that the initial decision of the presiding official shall be final unless a petition for review is filed by one of the parties to the appeal. Such a petition may be granted when it meets the criteria set forth at 5 C.F.R. 1201.115. The appellant's petition requesting review of the initial decision is based solely on additional material which he states was not available at the time of his original hearing.

That materal consists of information concerning appellant's visits to a physician between February and April 1979. The Board finds that the petition fails to show that the evidence was unavailable when the record closed on October 4, 1979. It also fails to show the materiality of the evidence, inasmuch as the charges at issue related to AWOL after May 7, 1979, while the submission states only that appellant was incapacitated from January 27-March 19, 1979. Therefore, the Board finds that none of the criteria for review has been met.

Accordingly, the petition for review is DENIED. This is a final decision of the Merit Systems Protection Board.

The appellant has the right to petition the Equal Employment Opportunity Commission to consider this decision on the issue of discrimination. The appellant also has the right to file a civil action under the antidiscrimination laws in any appropriate U.S. District Court. Either a petition to EEOC or a civil action in a U.S. district court must be filed no later than 30 days after the appellant's receipt of this decision.

Except for actions filed under the antidiscrimination laws, a petition for judicial review of this decision must be filed in the appropriate U.S. Court of Appeals or in the U.S. Court of

Claims no later than 30 days after receipt of notice of the Board's final decision.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 8, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ZELDAR MCQUERTER
v.
DEPARTMENT OF THE ARMY

Docket No.
SE075209077

OPINION AND ORDER

This appeal was dismissed by the Seattle Field Office of the Merit Systems Protection Board as untimely filed. In a petition for appeal filed on February 28, 1980, the appellant, Zeldar McQuerter, had complained that she was suspended unlawfully from the position of Nursing Assistant with the agency, the Department of the Army, from September 17, 1979, through February 20, 1980, after being found unfit for duty by an agency medical officer. The presiding official held the fact that notice of the denial of the appellant's application for disability retirement was not received until February 9, 1980, did not constitute good cause for a waiver of the 20-day time limit for filing an appeal, imposed by 5 C.F.R. 1201.22(b).

In the appellant's petition for review of the dismissal, she contended that her petition for appeal had been filed in a timely manner. She submitted along with her petition a copy of an official Notification of Personnel Action dated February 1, 1980, indicating that her involuntary leave without pay status from October 9, 1979, through March 9, 1980, was "retroactive due to administrative oversight by submitting activity." She posited, therefore, that her right to appeal did not accrue until after February 1, 1980.

The Board finds that the fact that the appellant received no formal decision notice for the agency's allegedly unlawful suspension action until after February 1, 1980, and the fact that such notice contained no statement of appeal rights as required by 5 C.F.R. 1201.21, constitute good cause for waiving the 20-day time limit for filing a petition for appeal under 5 C.F.R. 1201.12.

Accordingly, the initial decision dated June 20, 1980, is hereby REVERSED and this appeal is REMANDED to the Seattle Field Office for further proceedings consistent with this opinion.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 8, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

Raymond L. Santiago, Jr.
v.
Department of the Air Force

Docket No.
DA075209011

Opinion and Order

Appellant appealed from an action by the Department of the Air Force, Reese Air Force Base, Texas, which removed him from the position of Store Worker. The removal action was based upon the charge of improper possession of a dangerous drug on government premises.

In the initial decision, the presiding official found that the agency's supporting evidence of the charge against appellant was insufficient to meet the preponderance of evidence standard, as set forth in 5 U.S.C. 7701(c)(1)(B). Therefore, he reversed the agency's removal action.

The agency filed a petition for review contending that new evidence was available that would be sufficient to support the removal action; that the presiding official erred in finding that the removal action was not supported by a preponderance of the evidence; and, that since petitioner neither rebutted nor contradicted the agency's evidence, the preponderance of the evidence must be found to support the agency's case.

Upon examining the record, the Board finds that the agency has not established that new and material evidence is now available which was not available when the record was closed. The items submitted by the agency, consisting of statements of witnesses, a document attesting to the chain of custody of items allegedly seized from apppellant, and a legible copy of an "Incident/Complaint Report," clearly were all either in the agency's possession or, with due diligence, could have been compiled for submission to the presiding official. The agency has made no showing of the unavailability of such documentation; hence, we decline to reopen the initial decision in order to consider it.

Nor has the agency established that the presiding official erred in finding that the preponderance of evidence standard was not met. The Board agrees with the presiding official's finding that the agency did not meet its burden of proving by a preponderance of evidence the charge against petitioner. The assertion that the agency's evidence, whatever its quality, must be found to be the preponderance since the appellant introduced only his assertions is without merit. The presiding official correctly cited the regulatory definition of "preponderance of the evidence" at 5 C.F.R. 1201.56(c)(2), and we hold that the agency has failed to show error in the application of that definition to the record of the instant case.

Thus, the Board finds that the regulatory criteria for review have not been met. See 5 C.F.R. 1201.115. Accordingly, the petition for review is denied.

The agency is hereby ORDERED to furnish evidence of compliance with the initial decision to the Field Office within ten (10) days of the date of this order.

This is the final order of the Merit Systems Protection Board in this appeal. This initial decision shall become final five (5) days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of this order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 8, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ROBERT A. SESSLER
v.
DEPARTMENT OF HEALTH
AND HUMAN SERVICES

Docket No.
NY531D09002

OPINION AND ORDER

Petitioner, a Consumer Safety Officer, GS-12, Step 5, appealed from a June 25, 1979 reconsideration decision of the agency which sustained a determination to withhold his within-grade step increase, for which he was eligible on April 8, 1979.

The agency alleged that its determination was based on its finding that the quality of petitioner's work was not of an acceptable level of competence (ALOC). The agency also indicated that, in view of petitioner's grade level, his knowledge of inspection techniques was not acceptable, and that he required an inordinate amount of supervision, follow-up, control, and review.

The presiding official found, upon reviewing the record, that the agency presented sufficient evidence to support its action by a preponderance of evidence pursuant to 5 U.S.C. 7701(c)(1).

Petitioner alleged, in his petition for review by the Board, that the presiding official may have misinterpreted the law in the initial decision; that he clearly made erroneous statements which were detrimental to petitioner; and that he ignored certain key documents and testimony.

Pursuant to 5 U.S.C. 5335, an employee occupying a permanent position subject to the General Schedule is entitled to periodic within-grade step increases if his performance has been at an acceptable level of competence.

When a determination is made that an employee has not met the ALOC standard, the employee, subsequent to a reconsideration determination, has the right to appeal the determination to the Board. See 5 U.S.C. 5335(c); 5 C.F.R. 531.407(e); 5 U.S.C. 7701.

However, once an initial decision has been issued by a presiding official, the Board will undertake the burden of a complete review of the record only if the petitioning party has explained in the petition why the challenged factual determination is incorrect, and has identified the specific evidence in the record which demonstrates the error. *Claude Weaver v. Department of the Navy*, 2 MSPB 297 (1980).

The Board finds that the petition for review merely reargues the facts of the case, and asserts nothing more than petitioner's disagreement with the presiding official's findings and conclusions. Hence, the instant petition for review does not meet the review requirement set forth in *Weaver, id.*

The Board notes that the presiding official erred in applying the preponderance of evidence standard of proof in this case. The substantial evidence standard is the burden of proof which should be applied in ALOC determination cases. See *Parker v. Defense Logistics Agency*, 1 MSPB 489 (1980). Nevertheless, the Board finds that the application of the preponderance standard merely placed a greater burden of proof upon the agency than is required by law. The record clearly reveals that the agency presented substantial evidence to support its determination to withhold petitioner's within-grade step increase for failing to perform at an acceptable level of competence.

Thus, the Board finds that the regulatory criteria for review have not been met. See 5 C.F.R. 1201.115.

Accordingly, the petition for review is denied.

This is the final decision of the Merit Systems Protection Board in this case. Petitioner is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after petitioner's receipt of this order.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 8, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

THADDEUS WIECEK
v.
DEPARTMENT OF JUSTICE

Docket No.
SF075209081

OPINION AND ORDER

Appellant, Thaddeus Wiecek, was a service detention officer with the Immigration and Naturalization Service until he was removed based on charges of being involved in an altercation with local police while intoxicated, being intoxicated on duty, misstating a material fact in connection with an official investigation, and several other related offenses. After a hearing, the presiding official found all but one of the charges supported by the evidence, and concluded that appellant's removal would promote the efficiency of the service. The appellant then petitioned the Board for review of the initial decision.

The petition disputed the findings of the presiding official, and asserted that the agency action was not supported by a preponderance of the evidence. Since the petition set forth objections to each charge as sustained, we shall address the presiding official's findings, and objections thereto, seriatim.

The first charge against appellant was that he became involved in an altercation with local police due to inappropriate behavior on his part. The presiding official found the charge supported by a preponderance of the evidence. The appellant was approached initially by an airport policeman because he appeared to be intoxicated and he was trying to start a government car. A second policeman joined the scene, and appellant's behavior became abusive, resulting in his arrest. An open whiskey bottle was seen in the car at the time.

In the petition appellant contended that the findings were not supported by the evidence; he cited his testimony and a statement by his partner as support for this proposition, and he questioned the statement given by the arresting officer. He also noted that the charges against him were later dismissed.

While the appellant's assertions do support his position to some degree, the presiding official considered all of the evidence and found that the weight of the evidence supported the agency action. Notably, the appellant admitted he was involved in a confrontation and he supported portions of the officer's reports; a prior statement by appellant's partner was inconsistent with appellant's position and it substantiated the police report. We find the appellant's assertions do not establish a ground for granting the petition. The inconsistencies of appellant's testimony and his partner's statement were duly noted and evaluated by the presiding official, and his conclusions are consistent with the record.

As to the charge of possession of intoxicants in a government vehicle, appellant argued the charge could not be sustained because the bottle of whiskey seen in the car was not confiscated and produced as evidence. This argument is specious in light of appellant's admissions in his written reply to the proposed action and his testimony at the hearing that there was a bottle in the car.

Appellant argued that the fourth charge [1] should not have been sustained because the requirement that he wear a uniform was not consistently enforced. Appellant admits that the agency policy requires employees to wear a uniform but cites no facts which support a claim of disparate treatment. His bare allegation does not meet the criteria for review.

The fifth and sixth charges centered on what time appellant reported for work, and whether he worked the time claimed on October 22, 1978. As in the first charge above, appellant argued that the evidence should have been interpreted to find that the charges were not sustained. Again he cites no new evidence but merely cites evidence which was considered and found unpersuasive by the presiding official. Neither does he establish that the presiding official's conclusion was based on an erroneous interpretation of statute or regulation.

In summary, giving due deference to the credibility assessment of the presiding official, we conclude that the factual errors alleged by appellant are not supported by the record. The evidence cited by appellant does not, when considered with all the evidence, "justify attributing greater credibility to his . . . testimony . . . nor does it impeach the reasoning on which the presiding official predicated his credibility" findings, which were carefully made. *Weaver v. Department of the Navy*, 2 MSPB 297 (1980). The petition for review is therefore denied.

This is a final decision of the Merit Systems Protection Board. A petition for judicial review of this decision may be filed in the appropriate circuit of the U.S. Court of Appeals or in the U.S. Court of Claims no later than 30 days after receipt of this decision.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 8, 1980*

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[1] Reason number 3 was not sustained by the presiding official.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

James E. Butler	Docket No.
v.	DC035109084
Department of the Interior	

Opinion and Order

Appellant filed a petition for appeal dated February 7, 1980, from his separation by means of a reduction in force (RIF) effective May 18, 1979. Appellant conceded his petition was untimely filed but claimed that his separation was effected by procedural error. The presiding official provided appellant the opportunity to submit evidence or argument supported by affidavit to show good cause under 5 C.F.R. 1201.12 for waiving the time limit for filing a petition under 5 C.F.R. 1201.22. Appellant responded by letter that he had not appealed to the Board because he had attempted to appeal the RIF through the agency.

The presiding official found in his initial decision that appellant had not shown good cause for extending the time limit for filing his petition. The presiding official, therefore, dismissed the appeal.

Appellant timely filed a petition for review in which he elaborated on his argument that the RIF was effected by procedural error and his reasons for attempting to appeal through the agency. Appellant asserted that 4 days prior to the effective date of the RIF he was informed by an agency personnel officer that as appellant served under an excepted appointment he was not afforded the benefit of RIF procedures.

We believe that if appellant was unaware of his appeal rights because the agency, deliberately or otherwise, affirmatively misrepresented to appellant that he had no right of appeal to this Board, good cause would be established for the delay in filing his appeal. Appellant, therefore, should be afforded the opportunity to prove his allegation that he was misled by the agency. *Cf. Cooper v. Bell,* No. 78-2265 (9th Cir. August 21, 1980).

In order to avoid a sequential hearing first on the issue of good cause for the untimely appeal and then on the merits if the threshold issue is resolved in appellant's favor, the presiding official should conduct a hearing on both issues and issue an initial decision on the merits only if he first concludes that appellant has shown good cause under 5 C.F.R. 1201.12 for his untimely appeal. Accordingly, the petition for review is GRANTED, the initial decision of the presiding official is REVERSED in its findings of fact and VACATED in its decision that the appeal be dismissed. The case is REMANDED to the presiding official for further proceedings in accordance with this Opinion.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 9, 1980*

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

I. LEE CALLAHAN
v.
ENVIRONMENTAL PROTECTION
AGENCY

Docket No.
SF035109001

OPINION AND ORDER

Appellant's position of Administrative Assistant, GS-9, was abolished by the agency as a result of a reorganization of the Environmental Research Laboratory, Corvallis, Oregon. She was offered and declined assignment to lower-graded positions. Accordingly, appellant was separated by application of reduction-in-force (RIF) procedures.

Appellant filed an appeal with the Board's San Francisco Field Office contending that she should have been offered "retreat" rights to specific secretarial positions at the GS-8 and GS-6 level, alleging she was promoted from or through essentially identical positions. The presiding official found that she was properly reached for release from her competitive level when the agency determined to abolish her position. After noting that no allegation of misclassification of the positions in question was raised and that the proper classification in the GS-318 secretary series required a parenthetical designation, the presiding official concluded that appellant had no retreat rights to the identified positions. He, therefore, affirmed the agency action.

In her petition to the Board, appellant again raised the contention that she is entitled to retreat rights, claiming that comparison of titles is not sufficient; the duties and responsibilities must be considered. Further, she submitted documents concerning various other secretarial positions to support her argument that there was a change in titling practices but that GS-6 secretary positions have remained substantially the same.

Because the case raises a significant issue concerning retreat rights, the petition for review is GRANTED.

The application of the regulations set out in 5 C.F.R. Part 351 determines the nature of an employee's release from his/her competitive level. The proper determination of entitlement under the RIF regulations to "retreat" is a substantive right of the employee, which is to be sustained only if supported by a preponderance of the evidence. 5 U.S.C. 7701(c) (1)(B); *see* also *Losure v. Interstate Commerce Commission*, 2 MSPB 361 (1980).

5 C.F.R. 351.703(a) provides that an agency shall assign an employee in appellant's situation to a position from or through which the employee was promoted or to a position essentially identical thereto. Since neither the appellant nor the agency were able to provide the position description for the GS-6 secretary (stenography) position from which appellant had been promoted in 1973, the presiding official relied upon the titles assigned to the positions rather than comparing the duties and responsibilities. As a result the presiding official found that appellant did not have "retreat" rights to secretary (typing), GS-6, positions.

The agency relied upon a letter from the Office of Personnel Management which stated that secretarial positions with different parenthetical designations, e.g., stenography and typing, are not substantially identical for purposes of retreat rights. The Board, however, in a case arising under essentially the same facts, held that "The fact that two positions under consideration have different titles does not necessarily demonstrate that the positions are dissimilar." *MacDonald v. E.P.A.*, 1 MSPB 456 (1980).

As noted above, the presiding official did not look behind the position titles in determining appellant's retreat rights. Once the appellant raised the issue of the identity of GS-6 secretarial positions, the burden was on the agency to prove it had followed proper procedures in effecting the RIF. 5 U.S.C. 7701(c)(1)(B). This burden on the agency reflects appropriately the fact that the agency is the proponent of the action at issue and ordinarily possesses or has readier access to the evidence.

The position description of the GS-6 secretary (stenography) position appellant occupied in 1973 was not part of the record, and, as mentioned above, the presiding official only made a comparison of the secretary (stenography) and secretary (typing) positions based on the parenthetical designations. We find this to be inappropriate and not suitable to resolve the assignment rights matter, since the actual duties and responsibilities of the positions in question must be compared to ascertain whether they are substantially the same.

It was incumbent upon the agency to either produce the position description for the job the appellant had held or to introduce other evidence as to what appellant's duties actually were in 1973. Accordingly, the initial decision is RESCINDED and the case is REMANDED to the field office for further consideration. The presiding official should allow the parties a reasonable opportunity to supplement the existing record before making a new adjudication. If the agency is unable to prove by a preponderance of the evidence that it followed the proper procedures as to appellant's retreat rights, the RIF, as to appellant, must be reversed.

For the Board:

ERSA H. POSTON.

Washington, D.C., *October 9, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWARD J. HOLMES
v.
U.S. POSTAL SERVICE

Docket No.
AT075209067

OPINION AND ORDER

The appellant was removed from his position as a Mail Handler, United States Postal Service, Miami, Florida for being AWOL and for failing to attend a Program for Alcoholic Recovery (PAR) meeting. In the initial decision, the presiding official found the reasons for the removal supported by the preponderance of the evidence. In a letter dated January 11, 1980 filed by appellant's representative, the Board was requested to allow a petition to review an additional witness who was not available for the hearing. Appellant was granted an extension of time to March 25, 1980, for filing a petition for review of the initial decision of the presiding official. To date, however, no petition has been submitted.

Accordingly, the Board finds that appellant has failed to prosecute his petition. *See Bennett v. Department of the Navy*, 2 MSPB 93 (1980).

Therefore, the petition for review is dismissed.

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five days from the date of this order. 5 C.F.R. 1201.113(b).

Appellant is hereby notified of the right to seek judicial review of the Board's action as specified in 5 U.S.C. 7703. A petition for judicial review must be filed in the appropriate court no later than thirty (30) days after appellant's receipt of the order.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 9, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

William D. Jones
v.
Farm Credit Administration

Docket No.
SL075209015

Opinion and Order

Appellant by his counsel timely filed a petition for appeal with the Board's St. Louis Field Office from the action of the Farm Credit Administration, Bloomington, Minnesota, removing him as a Farm Credit Examiner, GS-570-11, effective August 31, 1979. The basis for his removal consisted of various instances of alleged insubordination, absence without leave (AWOL), disrespectful conduct towards supervisory personnel, and failure to follow instructions.

Appellant's testimony at the hearing before the Field Office and his written submissions adduced in response to the notice of proposed removal raised as an affirmative defense an alleged violation of procedural due process by the agency in effecting his removal. Appellant argued that most of the alleged instances of insubordination, AWOL, and failure to follow instructions centered upon his declination to correct and complete, or to report to work as ordered on various occasions in June and July 1979 to complete, three audit working papers which he had initially prepared. Appellant asserted to the agency and before the presiding official that he refused to work on those papers as ordered because they were subject at that time to review by an agency grievance examiner.

The record reveals that the agency had proposed appellant's suspension effective July 1 through 7, 1979, on the basis of appellant's alleged disrespectful conduct toward supervisory personnel and his alleged failure to follow instructions to correct and complete the three audit working papers under standards of methodology implemented by his superiors. Appellant filed a formal grievance dated June 12, 1979, on the proposed suspension under the agency's administrative grievance system established pursuant to 5 C.F.R. Part 771, subpart C. Appellant asserted that his auditing procedure conformed to previously acceptable agency standards, that the working papers were complete, and that the failure to follow instructions charge was unwarranted. The grievance examiner reviewed the original working papers on July 26 and

27, 1979, and noted that appellant had not accomplished any additional substantive work on them. The deciding official upon review of the examiner's report and other evidence of record sustained the suspension.

The core of appellant's argument before the presiding official was that appellant was justified in his alleged insubordination, AWOL, and failure to follow instructions relative to his refusal to correct and complete the audits because the working papers constituted the evidence essential to the disposition of his grievance. Thus, any amendment or change of the original papers before the examiner could review them might have eradicated the evidence and emasculated his right to grieve under 5 C.F.R. Part 771.

The presiding official in his initial decision dated December 14, 1979, found all of the charges save "Disrespectful Conduct Towards Supervisory Personnel" were supported by a preponderance of the evidence and sustained appellant's removal. However, he stated that he did not "understand appellant's assertion that the outcome of his grievance might be affected by his continuing to work on the papers in question." Initial decision at 13.

Appellant's timely petition for review asserted in part that the removal action was based largely upon his conduct on the matters which were subject to grievance on his proposed suspension and constituted a denial of procedural due process of his right to grieve. *See* petition for review at 9-10.

The agency's response argued in relevant part that the charges supporting appellant's removal were separate from those relating to his grievance and were brought "only after an unsuccessful attempt on the part of agency management to exercise its legitimate responsibilities for controlling the conditions of employment."

Appellant's failure to correct and complete the three audits which were subject to grievance constituted a cornerstone of the removal action. However, it is not clear in this case whether the agency's grievance procedures provided "the employee a reasonable opportunity to present a grievance and receive fair consideration on the matter being grieved," 5 C.F.R. 771.302(b), so that appellant's refusal to complete the audit was not justifiable. The presiding official did not find whether the agency's instructions to appellant would have preserved intact the original working papers or copies for review by the examiner in the "grievance file." *See* 5 C.F.R. 771.202. The agency's Administrative and Personnel Handbook, Chapter 771, "Grievance System," provides in relevant part only that the grievance file must contain all documents related to the grievance including records or copies of records and that all documents in the file must be available to the employee and representatives for review and comment.

Inasmuch as the three audit working papers were the key evidence on which appellant's grievance was based and the examiner reviewed the original papers, the presiding official should establish whether the agency preserved copies and communicated this to appellant or whether appellant was afforded the opportunity to preserve copies for review by the examiner so that appellant could correct and complete the originals without jeopardizing his grievance. Alternatively, the presiding official should determine whether the original papers were to be completed in a manner that would readily permit the examiner to separate the original product from the corrected and completed papers. Additionally, the record is not sufficiently developed with regard to the precise orders to appellant for his correction and completion of other audits and work which were not part of the grievance proceeding but which appellant was ordered to complete along with the audits subject to grievance. Upon making findings of fact on these matters, the presiding official must determine whether the agency gave appellant proper orders which he could obey without jeopardizing his pending grievance. If the agency does establish that it gave appellant proper orders, appellant must be afforded the opportunity to raise any other defenses to the specifications relating to his failure to complete the audits which were subject to the grievance proceeding.

Further, the agency's schedule of penalties and offenses does not form a part of the record. On remand the presiding official should examine the schedule to determine whether removal is a proper penalty for any charges which may be found sustained. In the event that any or all of the charges are found sustained, he must determine whether the removal action was for such cause as will promote the efficiency of the service. 5 U.S.C. 7513(a).

Upon remand the presiding official should reopen the record to allow the parties a reasonable opportunity to supplement the existing record before making a new adjudication on the merits.

Accordingly, the petition for review is GRANTED, the initial decision of the presiding official is REVERSED in its findings of fact, and VACATED in its decision that the removal action be sustained. The case is REMANDED to the presiding official for readjudication consistent with this Opinion.

For the Board:

RONALD P. WERTHEIM.

Washington, D.C., *October 9, 1980*

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOSEPH H. RYALS v. DEPARTMENT OF THE ARMY	Docket No. AT043209006

OPINION AND ORDER

The appellant received notice of removal from his position of Mathematician, GS-9, for unacceptable performance, effective December 28, 1979. He appealed to the Atlanta Field Office and presented substantive arguments concerning the removal action. The action was cancelled by the agency because the appellant had accepted a position at a lower grade in lieu of removal. The presiding official dismissed the appeal as not within the appellate jurisdiction of the Board.

In his petition for review, the appellant reiterated the arguments he had presented in his appeal and submitted an affidavit which stated that severe personal difficulties necessitated that he accept the lower graded position rather than be removed from government service. An examination of the record reveals that the appellant was not served with all of the pleadings and attachments as required by 5 C.F.R. 1201.26(b). Had the appellant received notice that the cancellation of the removal action due to his acceptance of the lower graded position was a part of the record to be considered by the presiding official, he may have responded, as he did in the petition for review, with arguments as to the voluntariness of his acceptance of that position.

The Board does not intimate any opinion at this time as to whether the appellant's acceptance of the lower graded position was in fact a forced down-grading which would come within the Board's jurisdiction. That matter is best left initially for the presiding official to determine, subject to the Board's review.

Accordingly, the petition for review is GRANTED and the decision of the presiding official dated March 3, 1980, is hereby VACATED and the case REMANDED to the field office for the purpose of affording the parties an opportunity to be heard on the issue of the voluntariness of the appellant's acceptance of the lower graded position.

For the Board:

ROBERT E. TAYLOR,
Secretary.

Washington, D.C., *October 9, 1980*

SHORT DENIALS AND DISMISSALS

AGNEW, Larry C. v. Dept. of Transportation (Docket No. DE03158010020) (9/16/80)
ALPERT, Robert H. v. Dept. of the Treasury (Docket No. NY752s09006) (10/7/80)
ARESON, Rita v. Dept. of the Army (Docket No. SF035109002) (9/22/80)
ARROYO, Cesar I. v. Dept. of the Air Force (Docket No. DC075209008) (10/9/80)
BAADE, Patricia v. Environmental Protection Agency (Docket No. DC07528010152) (10/8/80)
BARRETT, John F. v. U.S. Postal Service (Docket No. SF075299138) (10/3/80)
BAUER, John R. v. U.S. Postal Service (Docket No. CH075209149) (9/25/80)
BA'TH, Mikal Huda v. District of Columbia Government (Docket No. DC531D09025) (10/7/80)
BENSAL, Edward, et al. v. Dept. of Transportation (Docket No. SF075209095) (10/2/80)
BOTKIN, Harry v. Dept. of the Interior (Docket No. DA752S09001) (9/16/80)
BOYCE, Joseph v. Dept. of Health and Human Services (Docket No. NY531D09006) (10/8/80)
BRASS, Sarah v. Social Security Administration (Docket No. CH075209095) (10/8/80)
BRENNAN, Thomas J. v. Dept. of the Navy (Docket No. BN075209043) (10/9/80)
BREWER, Carolyn v. Dept. of the Interior (Docket No. DA035109003) (9/30/80)
BRICE, Louise S. v. Dept. of the Army (Docket No. PH043209005) (9/18/80)
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BROWN, Barbara v. Dept. of Transportation (Docket No. DC075209013) (10/2/80)
BROWN, Carl E. v. Dept. of Transportation (Docket No. SF075209164) (10/3/80)
BURDINE, John v. Veterans Administration (Docket No. CH075299010) (10/3/80)
BUSTOS, Manuel v. U.S. Postal Service (Docket No. DA035309011) (10/3/80)
BUTLER, Donald E. v. Dept. of the Navy (Docket No. BN035109012) (10/9/80)
CALDWELL, Frankie E. v. Tennessee Valley Authority (Docket No. AT035109029) (10/9/80)
CAPUZZI, Ezekiel S. v. Dept. of the Army (Docket No. PH315H8910059) (10/6/80)

CARDUCCI, Romeo v. Dept. of the Army (Docket No. DE075299030) (10/9/80)

CAREY, Larry C. v. Veterans Administration (Docket No. NY315H09017) (9/17/80)

CARPENTER, George C. v. Dept. of the Treasury (Docket No. CH531D09016) (10/2/80)

CARPENTER, Larry R. v. Dept. of Justice (Docket No. SF075209148) (10/2/80)

CASS, Edmund B. v. Dept. of Agriculture (Docket No. AT315H09035) (9/17/80)

CASSIDY, Edward W. v. Drug Enforcement Agency (Docket No. PH075209063) (10/6/80)

CHIEN, Chin Chang v. Equal Employment Opportunity Commission (Docket No. DA075209095) (9/17/80)

CLARK, Gene A. v. General Services Administration (Docket No. SL075209063) (10/8/80)

CLEMENTS, Willie A. v. U.S. Postal Service (Docket No. AT035309007) (9/2/80)

COLVIN, A. Howard v. Dept. of Justice (Docket No. CH083109002) (9/17/80)

CONDRA, Kenneth I. v. Environmental Protection Agency (Docket No. DC075209126) (10/7/80)

COOL, Danny L. v. Dept. of the Army (Docket No. CH075209180) (10/8/80)

CRENSHAW, John W. v. U.S. Postal Service (Docket No. CH075209188) (10/9/80)

CRUZ, Mary L. v. Dept. of Justice, U.S. Marshals Service (Docket No. DC075209220) (10/8/80)

DAVIS, Carolyn J. v. Dept. of Agriculture (Docket No. AT315H09026) (9/25/80)

DAVIS, Charles H. v. Dept. of the Air Force (Docket No. AT075209218) (9/30/80)

DAVIS, William J. v. Dept. of Transportation (Docket No. DC075209136) (10/8/80)

DEANS, June B. v. Small Business Administration (Docket No. AT035109048) (9/18/80)

DECKARD, John W. v. Tennessee Valley Authority (Docket No. AT035109046) (10/9/80)

DEPP, James R. v. U.S. Postal Service (Docket No. CH075209080) (9/25/80)

DESTITO, Frank S. v. Dept. of Transportation (Docket No. BN075209019) (10/8/80)

DOUGLAS, Bessie G. v. Dept. of Housing and Urban Development (Docket No. DC075209088) (10/8/80)

DREW, Frederick A. R. v. Dept. of the Navy (Docket No. SF075209152) (10/9/80)

DURDEN, Robert L. v. Dept. of the Navy (Docket No. AT075209219) (9/30/80)

EDMONSON, John H. v. Dept. of Justice (Docket No. CH075209030) (10/7/80)

EISMAN, Donald B. v. Environmental Protection Agency (Docket No. SF035199007) (10/8/80)

ELLIS, Rex v. Dept. of Health, Education, and Welfare (Docket No. DA075209167) (9/16/80)

ESCALANTE, David A. v. Dept. of the Air Force (Docket No. DA075299027) (10/8/80)

FISHER, Caricia v. Dept. of Labor (Docket No. DC315H09014) (9/17/80)

FISH, Eugene F. v. Dept. of Transportation (Docket No. DA075209177) (10/6/80)

FLOYD, Brenda K. v. Dept. of Health and Human Services (Docket No. PH315H9033) (9/18/80)

FRANKLIN, Donald A. v. U.S. Postal Service (Docket No. CH075209196) (10/8/80)

FURMAN, Kimberly M. v. Dept. of the Navy (Docket No. PH315H8010077) (10/2/80)

GALLAGHER, John J. v. Office of Personnel Management (Docket No. CH073109005) (10/8/80)

GANTT, Dorothy v. Dept. of the Navy (Docket No. DC07528010037) (9/25/80)

GOHEDOTTE, Gary D. v. Veterans Administration (Docket No. CH315H09027) (10/3/80)

GOODRICH, Clifton L. v. Dept. of the Navy (Docket No. NY075209128) (10/6/80)

GORMAN, James F. v. U.S. Postal Service (Docket No. BN344309004) (9/18/80)

GOULD, Charles J. v. Dept. of the Navy (Docket No. SE315H09008) (9/19/80)

GOULET, Norman P. v. Dept. of the Navy (Docket No. BN035109013) (10/9/80)

GRANT, Donald C. v. Dept. of the Army (Docket No. DC035109047) (10/8/80)

HAGE, Joseph J. v. Dept. of the Navy (Docket No. AT075209121) (9/16/80)

HAWKINS, James v. Dept. of the Navy (Docket No. PH075209139) (10/8/80)

HECK, Mary Jane v. Dept. of Health and Human Services (Docket No. DC0315H0918) (10/8/80)

HERNANDEZ, Rafael P., Jr. v. Dept. of the Treasury (Docket No. AT075209220) (9/19/80)

HERPST, Frank v. Dept. of the Navy (Docket No. BN035109014) (10/9/80)

HOEBEL, James F. v. Consumer Product Safety Commission (Docket No. DC075209145) (10/8/80)

HOERTER, Thomas A. v. Dept. of the Navy (Docket No. AT075209157) (9/26/80)

HOFFMAN, Marshall R. v. Dept. of the Army (Docket No. CH075209150) (9/19/80)

HORNE, Clarence C., Jr. v. U.S. Postal Service (Docket No. NY075209141) (10/8/80)

HULETT, Charles E. v. Dept. of the Air Force (Docket No. AT075209117) (9/19/80)

JACQUOT, Craig S. v. Dept. of Health, Education, and Welfare (Docket No. DA315H09026) (10/7/80)

JAMES, Melvin v. U.S. Postal Service (Docket No. SF075209124) (10/9/80)

JOCHIM, Patricia A. v. Dept. of Health, Education, and Welfare (Docket No. CH075209125) (10/7/80)

JOHNICAN, Ozzie A. v. U.S. Postal Service (Docket No. CH075209130) (10/8/80)

JOHNSON, Reo D. v. Dept. of the Army (Docket No. DC315H99004) (9/26/80)

JONES, Ralph F. v. Dept. of Commerce (Docket No. DE752090015) (10/8/80)

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INDEX

EXPLANATORY NOTES

This index to Volume 3, *Decisions of the United States Merit Systems Protection Board,* provides access to the Board's actions compiled in this volume only. This is a departure from the format followed in Volumes 1 and 2, where a separate index volume was published. In the future each volume of *Decisions of the United States Merit Systems Protection Board* will contain an index with the same features contained in the separate index for Volumes 1 and 2.

The index aids research into Volume 3 *Decisions of the United States Merit Systems Protection Board* with: Major Topics, Scope Notes for Major Topics, Outline of Topics, Decisions Listed Under Key Numbers, Alphabetical List of Words and Phrases, and Regulations and Statutes. These aids are interrelated and may be used to find key numbers and cases on a subject of interest to the researcher.

The Major Topics, Scope Notes for Major Topics, Outline of Topics, and Decisions Listed Under Key Numbers provide the researcher access by subject matter to the Board's actions printed in Volume 3 in *Decisions of the United States Merit Systems Protection Board.* Major Topics is a broad division of subject matter into 17 main areas by key numbers. The Scope Notes for Major Topics defines generally the subjects that fall within a major topic and suggests other major topics that the researcher may wish to examine. The Outline of Topics divides each major topic into more specific subtopics. These topics bear a key number based on the major topic and the degree of specificity of the subtopic.

Examination of the Outline of Topics will show the method by which the subtopics are numbered. Subtopics may be added in the future.

When the researcher has found the relevant key numbers, the Decisions Listed Under Key Numbers will provide the reference to Board actions on the subject. Where the Board issued multiple and identical documents for each of the proceedings listed in the caption of the document, only one document has been printed. Only the lead name in the captions is listed.

The Alphabetical List of Words and Phrases provides a cross-reference to key numbers under which actions relating to the word or phrase may be found in the Outline of Topics. The purpose of this list is to provide the researcher a way to identify a subject by different words that might be used to describe the subject matter. In parentheses after the key numbers are word guides to identify the major topic and subtopic to which each key number relates.

The list of Regulations and Statutes provides a cross-reference to key numbers under which actions relating to the subject of the statutory provision or regulation may be found in the Outline of Topics. The key number will provide access to the Outline of Topics and the Decisions Listed Under Key Numbers.

MAJOR TOPICS

(With Key Numbers)

1.000000 Adverse Actions
2.000000 Constitutionality
3.000000 Discrimination
4.000000 Evidence
5.000000 Freedom of Information, Privacy, and Sunshine Acts
6.000000 Jurisdiction
7.000000 Labor-Management Relations
8.000000 Particular Employment Categories
9.000000 Performance Related Actions
10.000000 Practice and Procedure
11.000000 Prohibited Personnel Practices
12.000000 Reductions in Force
13.000000 Regulation Review
14.000000 Remedies
15.000000 Retirement
16.000000 Special Counsel
17.000000 Suitability and Fitness for Duty Examinations

SCOPE NOTES FOR MAJOR TOPICS

ADVERSE ACTIONS (1.000000)

Certain personnel actions are designated as "adverse actions" under Chapter 75 of the Civil Service Reform Act of 1978. This topic references Board opinions relating to the substantive law governing those actions and distinguishes other personnel actions not designated as "adverse actions" under Chapter 75. This topic also encompasses cases involving Board consideration of penalties in adverse action cases including the mitigation of penalties. Board cases concerning procedures governing adverse actions are located under *Practice and Procedure (10.000000)*, and opinions relating to jurisdictional matters have been placed under *Jurisdiction (6.000000)*. Cases regarding remedies available to the Board in adverse action cases are located in *Remedies (14.000000)*.

CONSTITUTIONALITY (2.000000)

This topic references opinions in which the Board has considered constitutional aspects of cases before it. Included are claims pursuant to specific constitutional provisions, as well as claims derived from constitutional provisions, such as the right to privacy. Constitutional claims relative to discrimination are in *Discrimination (3.000000)*.

DISCRIMINATION (3.000000)

This topic refers to Board cases concerning the substantive law of prohibited discrimination pursuant to the Civil Service Reform Act of 1978. Also included are cases relating to affirmative action and disparate treatment of similarly situated employees. Questions of evidence, jurisdiction, practice and procedure and remedial action in discrimination cases are referenced in *Evidence (4.000000)*, *Jurisdiction (6.000000)*, *Practice and Procedure (10.000000)*, and *Remedies (14.000000)*, respectively.

EVIDENCE (4.000000)

This topic references cases dealing with substantive rules of evidence employed by the Board, as well as cases concerning the harmful error standard in the Act. The Board is bound by statutory burdens of proof, and cases referencing the Board's interpretation of such burdens are also included here.

FREEDOM OF INFORMATION, PRIVACY AND SUNSHINE ACTS (5.000000)

This topic references Board cases relating to the Freedom of Information, Privacy and Sunshine Acts.

JURISDICTION (6.000000)

This topic includes cases in which the Board has made specific reference to jurisdiction under the Civil Service Reform Act of 1978, as well as cases dealing with issues of justiciability. Since the jurisdiction of the Board differs with respect to certain entities, this topic includes cases dealing with jurisdictional questions particularly related to such entities. Included also are Board cases dealing with its enforcement power, which is a matter of continuing jurisdiction, and cases under the Act's savings provision. Jurisdiction over appeals related to retirement is covered under *Retirement* (15.000000).

LABOR-MANAGEMENT RELATIONS (7.000000)

This topic contains cases arising under Title VII of the Act, including collective bargaining issues and the rights of individual employees. Title VII grievance procedure cases brought before the Board are also located under this topic.

PARTICULAR EMPLOYMENT CATEGORIES (8.000000)

The Civil Service Reform Act of 1978 has provisions specifically applicable to certain categories of employees. This topic references cases in which the special procedural and substantive law applicable to such employee categories were discussed by the Board, and in which such special provisions were germane to the resolution of the case. Included are cases dealing with the merit pay provisions of the Act and the Senior Executive Service.

PERFORMANCE RELATED ACTIONS (9.000000)

This topic references cases dealing with performance related actions under Chapter 43 of the Act, including procedural rights and standards of proof under Chapter 43, where performance appraisal systems have been implemented. Also included are cases dealing with performance appraisal actions under Chapter 75, where Chapter 43 appraisal systems had not yet been implemented.

PRACTICE AND PROCEDURE (10.000000)

This is the major topic referencing cases which set out the procedural rules for matters before the Board, its administrative law judges, and its presiding officials. Matters such as timeliness and technical filing rules are included here, as well as the concepts of former adjudication and representation of parties.

PROHIBITED PERSONNEL PRACTICES (11.000000)

The Civil Service Reform Act of 1978 lists merit systems principles governing the Federal work force and defines prohibited personnel practices that may not be taken against Federal employees. This topic is limited to cases in which the Board has interpreted these provisions and related matters.

REDUCTIONS IN FORCE (12.000000)

This topic refers to Board cases dealing with reductions in force, including agency justifications for taking such actions and the substantive and procedural rights of employees affected.

REGULATION REVIEW (13.000000)

The Civil Service Reform Act of 1978 empowers the Board to review regulations promulgated by the Office of Personnel Management and implementing regulations of other agencies. This topic references Board opinions dealing with such regulation review.

REMEDIES (14.000000)

This topic references Board cases dealing with the remedial powers of the Board, e.g., attorney fees.

RETIREMENT (15.000000)

This topic refers to Board cases involving issues relating to the retirement of Federal employees.

SPECIAL COUNSEL (16.000000)

This topic references Board cases relating to the Office of Special Counsel, including the prosecution of Hatch Act cases and violations of the Federal Employees Flexible and Compressed Work

Schedule Act. The filing requisites for complaints before the Special Counsel are included here, while procedural requisites in Special Counsel cases before the Board are in *Practice and Procedure (10.000000)*.

SUITABILITY AND FITNESS FOR DUTY EXAMINATIONS (17.000000)

This topic references cases dealing with issues of suitability. Included also are cases involving fitness for duty examinations.

OUTLINE OF TOPICS

(With Key Numbers)

1.000000 Adverse Actions

1.100 ACTIONS CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.110 Removal
1.111 Involuntary Resignation or Retirement
1.120 Suspension for more than 14 days
1.130 Reduction in Grade
1.140 Reduction in Pay
1.150 Furlough of 30 days or less

1.200 ACTIONS NOT CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.210 Suspension for less than 14 days
1.220 Letter of Reprimand
1.230 Actions Based on Unacceptable Performance
1.231 Denial of Within Grade Step Increase
1.232 Reduction in Grade
1.233 Removal
1.240 Reduction in Force

1.300 SUBSTANTIVE CHARGES

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1.311 Absence Without Leave
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1.331 On-Duty Conduct
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2.321 Relation to Efficiency of the Service
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3.1312 Mental Disability
3.1313 Alcoholism and Drug Abuse
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3.140 Sex Discrimination
3.141 Civil Rights Act of 1964, 42 U.S.C. 2000e-16
3.142 Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)
3.143 Sexual Preference
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3.150 Religious Discrimination
3.151 Civil Rights Act of 1964, 42 U.S.C. 2000e-16
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Service, 3 MSPB 254 (1980); *Melvin Manning* v. *Dept. of Justice*, 3 MSPB 202 (1980); *Charles E. Marshall* v. *U.S. Postal Service*, 3 MSPB 91 (1980); *Wallace M. Mayo* v. *U.S. Postal Service*, 3 MSPB 525 (1980); *William S. McJunckins* v. *Dept. of the Treasury*, 3 MSPB 496 (1980); *Larry W. Meier* v. *Dept. of the Interior*, 3 MSPB 341 (1981); In re *Manuel Munoz*, 3 MSPB 482 (1980); *Bruce E. Neely* v. *Dept. of the Air Force*, 3 MSPB 420 (1980); *Albert Newby, Jr.* v. *Dept. of the Navy*, 3 MSPB 498 (1980); *Lawrence Oldham* v. *Veterans Administration*, 3 MSPB 293 (1980); *Alvin Page* v. *Federal Aviation Administration*, 3 MSPB 295 (1980); *Louis P. Parker* v. *U.S. Postal Service*, 3 MSPB 465 (1980); *Dalton Pixler* v. *Veterans Administration*, 3 MSPB 63 (1980); *Nathan G. Polite* v. *Dept. of the Navy*, 3 MSPB 486 (1980); *Steven D. Powell* v. *Dept. of the Interior*, 3 MSPB 35 (1980); *William Powers* v. *Dept. of Health, Education, and Welfare*, 3 MSPB 424 (1980); *Thomas A. Quarry* v. *General Accounting Office*, 3 MSPB 299 (1980); *Harold M. Ray* v. *Dept. of the Army*, 3 MSPB 86 (1980); *Herman J. Redding* v. *Dept. of the Interior*, 3 MSPB 489 (1980); *Marvin Reggans* v. *U.S. Postal Service*, 3 MSPB 352 (1980); *Roland L. Robinson* v. *Dept. of the Air Force*, 3 MSPB 77 (1980); *Kevin P. Rose* v. *Dept. of the Navy*, 3 MSPB 500 (1980); *William H. Russo* v. *Veterans Administration*, 3 MSPB 427 (1980); *Raymond H. Santiago, Jr.* v. *Dept. of the Air Force*, 3 MSPB 528 (1980); *Victor T. Seales* v. *U.S. Postal Service*, 3 MSPB 134 (1980); *Dorothy H. Smith* v. *Veterans Administration*, 3 MSPB 432 (1980); *Karleen S. Starkey* v. *Dept. of the Air Force*, 3 MSPB 377 (1980); *Donald R. Stemmer* v. *Dept. of the Army*, 3 MSPB 434 (1980); *Walter Szczerbiak* v. *U.S. Postal Service*, 3 MSPB 82 (1980); *Larry Taggart* v. *U.S. Postal Service*, 3 MSPB 220 (1980); *Lee S. Tennyson* v. *Dept. of the Air Force*, 3 MSPB 491 (1980); *Robert A. Thalacker* v. *Dept. of Agriculture*, 3 MSPB 352 (1980); *William Trowell* v. *U.S. Postal Service*, 3 MSPB 117 (1980); *Alan Van Winkle* v. *Veterans Administration*, 3 MSPB 306 (1980); *David R. Vick* v. *Dept. of the Navy*, 3 MSPB 445 (1980); *Myron T. Webb* v. *U.S. Postal Service*, 3 MSPB 469 (1980); *Emma Wells* v. *Dept. of the Navy*, 3 MSPB 380 (1980); *Thaddeus Wiecek* v. *Dept. of Justice*, 3 MSPB 532 (1980); *Maggie J. Wilkins* v. *Dept. of the Air Force*, 3 MSPB 447 (1980); *Guy F. Williamson* v. *Dept. of Health and Human Services*, 3 MSPB 142 (1980); *Jim J. Youraine* v. *Dept. of the Navy*, 3 MSPB 23 (1980).

1.111 Involuntary Resignation or Retirement

Candyce Becklund v. *Dept. of the Army*, 3 MSPB 127 (1980); *Daniel P. Croken* v. *U.S. Postal Service*, 3 MSPB 238 (1980); *John A. Hawkins* v. *Veterans Administration*, 3 MSPB 246 (1980); *Diane B. Jovanovich* v. *Veterans Administration*, 3 MSPB 510 (1980); In re *John W. King*, 3 MSPB 290 (1980); *Clyde W. McGowan* v. *International Communication Agency*, 3 MSPB 198 (1980); *Mary C. Pittman* v. *Office of Personnel Management*, 3 MSPB 68 (1980); *Gaston Powell, Jr.* v. *Dept. of the Treasury*, 3 MSPB 204 (1980); *Lee S. Tennyson* v. *Dept. of the Air Force*, 3 MSPB 491 (1980); *Patsy Vandiver* v. *General Accounting Office*, 3 MSPB 158 (1980).

1.120 Suspension for more than 14 Days

Teodoro Acosta v. *Dept. of the Navy*, 3 MSPB 210 (1980); *Maurice J. Bize* v. *Dept. of the Treasury*, 3 MSPB 261 (1980); *Raymond C. Bradley* v. *Dept. of the Navy*, 3 MSPB 115 (1980); *Ricky L. Christo* v. *U.S. Postal Service*, 3 MSPB 145 (1980); *John M. Giesler, Jr.* v. *Dept. of Transportation*, 3 MSPB 367 (1980); *Rudolph A. Greene* v. *Dept. of Health, Education, &*

Welfare, 3 MSPB 459 (1980); *Adam R. Klimek* v. *Dept. of the Army*, 3 MSPB 248 (1980); *Zeldar McQuerter* v. *Dept. of the Army*, 3 MSPB 527 (1980); *Stewart H. Prince* v. *Dept. of the Navy*, 3 MSPB 113 (1980).

1.130 Reduction in Grade

Dorothy Chiarelli v. *Dept. of the Treasury*, 3 MSPB 75 (1980); *Ronnie D. McLemore* v. *Dept. of the Interior*, 3 MSPB 413 (1980); *Lois A. Quinney* v. *Dept. of the Army*, 3 MSPB 123 (1980); *Keith H. Stout* v. *U.S. Postal Service*, 3 MSPB 440 (1980).

1.140 Reduction in Pay

Anthony T. Pezza v. *Dept. of Health and Human Services*, 3 MSPB 167 (1980).

1.150 Furlough of 30 days or less

1.200 ACTIONS NOT CONSIDERED ADVERSE UNDER 5 U.S.C. 7512

1.210 Suspension for less than 14 days

Dale D. Clark v. *Dept. of State*, 3 MSPB 94 (1980); *Frank Giresi* v. *Dept. of the Interior*, 3 MSPB 111 (1980); *Esther M. Marks* v. *Dept. of the Air Force*, 3 MSPB 17 (1980); *Lyman N. Price* v. *Veterans Administration*, 3 MSPB 206 (1980).

1.220 Letter of Reprimand

1.230 Actions Based on Unacceptable Performance

Mary K. Hatler v. *Dept. of the Air Force*, 3 MSPB 406 (1980).

1.231 Denial of Within Grade Step Increase

Alfred O. Herrera v. *Dept. of Health, Education, & Welfare*, 3 MSPB 478 (1980); *Vera Hurt* v. *Dept. of Health and Human Services*, 3 MSPB 507 (1980); *Judith M. Mills* v. *Dept. of Health, Education, & Welfare*, 3 MSPB 151 (1980); *Robert A. Sessler* v. *Dept. of Health and Human Services*, 3 MSPB 530 (1980); *Roberta L. Stevenson* v. *Dept. of the Treasury*, 3 MSPB 437 (1980).

1.232 Reduction in Grade

Donald W. Atwell, et al. v. *Dept. of the Army*, 3 MSPB 8 (1980); *Willie Burkhalter* v. *Dept. of the Air Force*, 3 MSPB 362 (1980); *Andrew F. Francetich* v. *Dept. of the Air Force*, 3 MSPB 456 (1980); *Walter Lew*, et al. v. *Dept. of the Treasury*, 3 MSPB 53 (1980).

1.233 Removal

1.240 Reduction in Force

1.300 SUBSTANTIVE CHARGES

1.310 Attendance Related

1.311 Absence Without Leave

Marion J. Coleman v. *Dept. of the Army*, 3 MSPB 26 (1980).

1.312 Abuse of Leave

1.313 Tardiness

1.320 Alcohol and Drug Related

1.321 On-Duty Conduct

Alvin B. Bonner v. *U.S. Postal Service*, 3 MSPB 452 (1980).

1.322 Off-Duty Conduct

1.330 Criminal Conduct
1.331 On-Duty Conduct
1.3311 Criminal Charges

Uhrico Cadena v. *Dept. of Justice*, 3 MSPB 390 (1980).

1.3312 Criminal Conviction
1.332 Off-Duty Conduct
1.3321 Criminal Charges
1.3322 Criminal Conviction

Laverne Chisholm v. *Defense Logistics Agency*, 3 MSPB 273 (1980).

1.340 Dishonest Work Related Conduct
1.341 Bribery
1.342 Embezzlement
1.343 Falsification

James L. Brown v. *U.S. Postal Service*, 3 MSPB 178 (1980).

1.344 Fraud
1.345 Misappropriation and/or Misuse of Government Property
1.346 Malfeasance in Office

1.350 Prohibited Political Activity

1.360 Other Work Related Charges

1.361 Abuse of Authority
1.3611 Sexual Harassment
1.3612 Prohibited Discrimination
1.362 Conflict of Interest
1.363 Insubordination
1.3631 Refusal to Accept Reassignment

Wayne C. Babros v. *Dept. of Agriculture*, 3 MSPB 385 (1980); *Patricia A. Dejoy* v. *Dept. of Health and Human Services*, 3 MSPB 96 (1980).

1.364 Gross Waste
1.365 Creation of Danger to Public Health and Safety
1.366 Insolence
1.367 Violence

1.370 Charges Related to Off-Duty Conduct

1.371 Efficiency of the Service
1.3711 Nexus

1.400 BOARD CONSIDERATION OF PENALTIES

Ronald G. Else v. *Dept. of Justice*, 3 MSPB 475 (1980); *Robert A. Thalacker* v. *Dept. of Agriculture*, 3 MSPB 354 (1980).

1.410 Mitigation of Penalty
1.420 Prior Disciplinary Record
1.430 Disparate Treatment of Similarly Situated Employees

Michael U. Fuiava v. *Dept. of Justice*, 3 MSPB 217 (1980).

2.000000 Constitutionality

2.100 DUE PROCESS

2.110 Liberty Rights or Interest

2.120 Property Rights or Interest

Donald W. Atwell, et al. v. *Dept. of the Army*, 3 MSPB 8 (1980).

2.130 Requisite Administrative Procedures

Clyde W. McGowan v. *International Communication Agency,* 3 MSPB 198 (1980).

2.200 CRIMINAL CONSTITUTIONAL CONSIDERATIONS

2.210 Self-Incrimination

2.220 Right to Counsel

2.230 Double Jeopardy

2.300 FIRST AMENDMENT FREEDOMS

Thomas A. Quarry v. *General Accounting Office,* 3 MSPB 299 (1980).

2.310 Freedom of Speech

2.311 Relation to Efficiency of the Service
2.3111 Defamation

2.320 Freedom of Religion

2.321 Relation to Efficiency of the Service
2.3211 Free Exercise
2.3212 Establishment

2.400 RIGHT TO PRIVACY

3.000000 Discrimination

3.100 PROHIBITED DISCRIMINATION

3.110 Age Discrimination

3.111 Age Discrimination in Employment Act of 1967, 29 U.S.C. 631, 633a

3.120 Race, Color, and National Origin Discrimination

Emmanuel Torres v. *Dept. of Justice,* 3 MSPB 443 (1980).

3.121 Civil Rights Act of 1964, 42 U.S.C. 2000e-16

3.130 Handicap Discrimination

3.131 Handicapping Condition
3.1311 Physical Disability
3.1312 Mental Disability
3.1313 Alcoholism and Drug Abuse
3.132 Rehabilitation Act of 1973, 29 U.S.C. 791
3.1321 Reasonable Accommodation
3.1322 Rehabilitation

Marion J. Coleman v. *Dept. of the Army,* 3 MSPB 26 (1980).

3.140 Sex Discrimination

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8.600 MERIT PAY

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9.130 Removal

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9.150 Promotion

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9.331 Substantial Evidence

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9.332 Preponderance of the Evidence—Chapter 75

9.3321 Efficiency of the Service

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9.33211 Nexus

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10.111 Filing of Appeal and Request for Hearing

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10.1111 Right to Hearing

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10.1112 Waiver of Right to Hearing

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10.113 Class Action

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10.1151 Intervention as a Matter of Right

10.1152 Permissive Intervention

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10.1161 Motion for Discovery

10.11611 Interrogatories

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10.11613 Production of Documents

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10.1211 Discretion

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10.12111 Dismissals

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Dept. of the Army, 3 MSPB 84 (1980); *Donald E. Harvey* v. *Veterans Administration,* 3 MSPB 39 (1980); *Mary K. Hatler* v. *Dept. of the Air Force,* 3 MSPB 406 (1980); *John A. Hawkins* v. *Veterans Administration,* 3 MSPB 246 (1980); *James F. Hayes* v. *National Aeronautics and Space Administration,* 3 MSPB 1 (1980); *Betty M. Hobson* v. *Dept. of the Navy,* 3 MSPB 79 (1980); *Andrew K. Holt* v. *Dept. of the Treasury,* 3 MSPB 130 (1980); *Henry S. Humphries* v. *Veterans Administration,* 3 MSPB 80 (1980); *Brian K. Hurst* v. *General Services Administration,* 3 MSPB 21 (1980); *William C. Jackson* v. *Dept. of Agriculture,* 3 MSPB 176 (1980); *Arthur D. Johnson* v. *U.S. Postal Service,* 3 MSPB 59 (1980); *Diane B. Jovanovich* v. *Veterans Administration,* 3 MSPB 510 (1980); *Stinson Kelly* v. *U.S. Postal Service,* 3 MSPB 461 (1980); *Walter Lew,* et al. v. *Dept. of the Treasury,* 3 MSPB 53 (1980); *Algie R. Lewis* v. *District of Columbia Government,* 3 MSPB 512 (1980); *Beverly Lewis* v. *Dept. of Justice,* 3 MSPB 409 (1980); *Charles Madrid* v. *Dept. of Justice,* 3 MSPB 234 (1980); *Esther M. Marks* v. *Dept. of the Air Force,* 3 MSPB 17 (1980); *Zeldar McQuerter* v. *Dept. of the Army,* 3 MSPB 527 (1980); *Harry P. Miller* v. *Federal Deposit Insurance Corporation,* 3 MSPB 416 (1980); *Jerald H. Miller* v. *U.S. Postal Service,* 3 MSPB 418 (1980); *John J. O'Halloran* v. *Dept. of Agriculture,* 3 MSPB 66 (1980); *Rhoda G. Ott* v. *Dept. of the Navy,* 3 MSPB 104 (1980); *Thomas A. Powers* v. *Dept. of Agriculture,* 3 MSPB 422 (1980); *Nancy E. Pratt* v. *Veterans Administration,* 3 MSPB 376 (1980); *Lyman N. Price* v. *Veterans Administration,* 3 MSPB 206 (1980); *Marvin Reggans* v. *U.S. Postal Service,* 3 MSPB 352 (1980); *John J. Robinson* v. *Dept. of Health, Education, & Welfare,* 3 MSPB 215 (1980); *Gilbert M. Roeder* v. *Office of Personnel Management,* 3 MSPB 467 (1980); *Wallace W. Rose* v. *Dept. of Transportation,* 3 MSPB 61 (1980); *Joseph H. Ryals* v. *Dept. of the Army,* 3 MSPB 543 (1980); *Frank J. Sanchez* v. *Dept. of the Air Force,* 3 MSPB 132 (1980); *Hilda B. Schulz* v. *Veterans Administration,* 3 MSPB 14 (1980); *Darrel F. Shepard* v. *Dept. of Agriculture,* 3 MSPB 49 (1980); *Patrice Smith* v. *Dept. of Health, Education, & Welfare,* 3 MSPB 3 (1980); *Emile H. Sonet, Jr.* v. *Dept. of the Treasury,* 3 MSPB 73 (1980); *Dean A. Thomas* v. *Veterans Administration,* 3 MSPB 121 (1980); *Elizabeth Tillery* v. *Dept. of Defense,* 3 MSPB 6 (1980); *Emmanuel Torres* v. *Dept. of Justice,* 3 MSPB 443 (1980); *William L. Warfield* v. *General Services Administration,* 3 MSPB 328 (1980).

10.12112 Failure to Prosecute

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10.1212 Ruling on Motions

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10.12121 Venue

10.12122 Interlocutory Appeals

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10.1213 Orders of Presiding Officials

10.12131 Compliance

10.1214 Decision

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Marshall v. *U.S. Postal Service*, 3 MSPB 91 (1980); *Mary C. Pittman* v. *Office of Personnel Management*, 3 MSPB 68 (1980); *Thomas A. Quarry* v. *General Accounting Office*, 3 MSPB 299 (1980).

10.12141 Content

Mary C. Pittman v. *Office of Personnel Management*, 3 MSPB 68 (1980).

10.12142 Effective Date
10.12143 Finality
10.12144 Summary Decision
10.12145 Recommended Decision
10.12146 Form
10.122 Bias

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10.123 Disqualification

10.130 Board Review of Initial Decision

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10.131 Board Reopening

Teodoro Acosta v. Dept. of the Navy, 3 MSPB 210 (1980); *Maurice J. Bize* v. *Dept. of the Treasury*, 3 MSPB 261 (1980); *Alvin B. Bonner* v. *U.S. Postal Service*, 3 MSPB 452 (1980); *George A. Burton* v. *U.S. Postal Service*, 3 MSPB 387 (1980); *James E. Butler* v. *Dept. of the Interior*, 3 MSPB 534 (1980); *Dorothy Chiarelli* v. *Dept. of the Treasury*, 3 MSPB 75 (1980); *Laverne Chisholm* v. *Defense Logistics Agency*, 3 MSPB 273 (1980); *Zelder Coachman* v. *Internal Revenue Service*, 3 MSPB 110 (1980); *Floyd Dugger* v. *Dept. of Justice*, 3 MSPB 194 (1980); *Richard A. Frost* v. *Dept. of the Navy*, 3 MSPB 226 (1980); *Frank Giresi* v. *Dept. of the Interior*, 3 MSPB 111 (1980); *John A. Hawkins* v. *Veterans Administration*, 3 MSPB 246 (1980); *Arthur D. Johnson* v. *U.S. Postal Service*, 3 MSPB 59 (1980); *William D. Jones* v. *Farm Credit Administration*, 3 MSPB 540 (1980); *Stinson Kelly* v. *U.S. Postal Service*, 3 MSPB 461 (1980); *Thomas F. Kennedy* v. *Dept. of the Treasury*, 3 MSPB 519 (1980); *Adam R. Klimek* v. *Dept. of the Army*, 3 MSPB 248 (1980); *James M. Lewis* v. *U.S. Marine Corps*, 3 MSPB 411 (1980); *Ricardo M. Luna* v. *U.S. Postal Service*, 3 MSPB 232 (1980); *Alvan T. Majors v. U.S. Postal Service*, 3 MSPB 254 (1980); *William M. Malko* v. *U.S. Postal Service*, 3 MSPB 161 (1980); *Leonie G. Mallory v. Dept. of the Navy*, 3 MSPB 100 (1980); *Melvin Manning* v. *Dept. of Justice*, 3 MSPB 202 (1980); *Clyde W. McGowan* v. *International Communication Agency*, 3 MSPB 198 (1980); *Jerald H. Miller* v. *U.S. Postal Service*, 3 MSPB 418 (1980); *Judith M. Mills* v. *Dept. of Health, Education, & Welfare*, 3 MSPB 151 (1980); *Alvin Page* v. *Federal Aviation Administration*, 3 MSPB 295 (1980); *Louis P. Parker* v. *U.S. Postal Service*, 3 MSPB 465 (1980); *E. Arthur Patterson* v. *Dept. of the Interior*, 3 MSPB 172 (1980); *Anthony T. Pezza* v. *Dept. of Health and Human Services*, 3 MSPB 167 (1980); *Gaston Powell, Jr.* v. *Dept. of the*

Treasury, 3 MSPB 204 (1980); *William Powers* v. *Dept. of Agriculture*, 3 MSPB 424 (1980); *Stewart H. Prince* v. *Dept. of the Navy*, 3 MSPB 113 (1980); *Joseph H. Ryals* v. *Dept. of the Army*, 3 MSPB 543 (1980); *Dorothy H. Smith* v. *Veterans Administration*, 3 MSPB 432 (1980); *Karleen Starkey* v. *Dept. of the Air Force*, 3 MSPB 377 (1980); *Keith H. Stout* v. *U.S. Postal Service*, 3 MSPB 440 (1980); *Robert A. Thalacker* v. *Dept. of Agriculture*, 3 MSPB 354 (1980); *Myron T. Webb* v. *U.S. Postal Service*, 3 MSPB 469 (1980); *Jackie L. Wilson* v. *Dept. of the Navy*, 3 MSPB 382 (1980).

10.132 Petition for Review

Anthony J. Barber v. *Dept. of the Army*, 3 MSPB 41 (1980); *Wayne C. Babros* v. *Dept. of Agriculture*, 3 MSPB 385 (1980); *Candyce Becklund* v. *Dept. of the Army*, 3 MSPB 127 (1980); *James L. Brown* v. *U.S. Postal Service*, 3 MSPB 178 (1980); *Pauline Cardullo* v. *Dept. of the Navy*, 3 MSPB 140 (1980); *Wilma Cofer* v. *Dept. of the Air Force*, 3 MSPB 175 (1980); *Sara E. Cooper* v. *Dept. of the Air Force*, 3 MSPB 398 (1980); *Elijah Drayton* v. *Dept. of the Navy*, 3 MSPB 57 (1980); *William Grant* v. *Dept. of the Navy*, 3 MSPB 42 (1980); *Betty M. Hobson* v. *Dept. of the Navy*, 3 MSPB 79 (1980); *Andrew K. Holt* v. *Dept. of the Treasury*, 3 MSPB 130 (1980); *Brian K. Hurst* v. *General Services Administration*, 3 MSPB 21 (1980); *Norman Jackman* v. *Federal Trade Commission*, 3 MSPB 88 (1980); *William C. Jackson* v. *Dept. of Agriculture*, 3 MSPB 176 (1980); *Esther M. Marks* v. *Dept. of the Air Force*, 3 MSPB 17 (1980); *Norman Miller* v. *Dept. of Health and Human Services*, 3 MSPB 513 (1980); *Judith M. Mills* v. *Dept. of Health, Education, & Welfare*, 3 MSPB 151 (1980); *Bruce E. Neely* v. *Dept. of the Air Force*, 3 MSPB 420 (1980); *Roland Robinson* v. *Dept. of the Air Force*, 3 MSPB 77 (1980); *Frank J. Sanchez* v. *Dept. of the Air Force*, 3 MSPB 132 (1980); *Victor T. Seales* v. *U.S. Postal Service*, 3 MSPB 134 (1980); *Maggie J. Wilkins* v. *Dept. of the Air Force*, 3 MSPB 447 (1980); *Edwin C. Wright, Jr.* v. *Dept. of the Navy*, 3 MSPB 184 (1980).

10.1321 Filing Requirements

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10.1322 Criteria

Teodoro Acosta v. *Dept. of the Navy*, 3 MSPB 210 (1980); *Carl H. Anderson* v. *Veterans Administration*, 3 MSPB 188 (1980); *Frances Anderson* v. *Dept. of Agriculture*, 3 MSPB 15 (1980); *Paul N. Avansino* v. *U.S. Postal Service*, 3 MSPB 308 (1980); *Anthony J. Barber* v. *Dept. of the Army*, 3 MSPB 41 (1980); *Wayne C. Babros* v. *Dept. of Agriculture*, 3 MSPB 385 (1980); *Candyce Becklund* v. *Dept. of the Army*, 3 MSPB 127 (1980); *Raymond K. Bentley* v. *Veterans Administration*, 3 MSPB 360 (1980); *Maurice J. Bize* v. *Dept. of the Treasury*, 3 MSPB 261 (1980); *Cheryl A. Bonsu* v. *Veterans Administration*, 3 MSPB 236 (1980); *Raymond W. Bradford* v. *Dept. of the Navy*, 3 MSPB 115 (1980); *James L. Brown* v.

U.S. Postal Service, 3 MSPB 178 (1980); *Uhrico Cadena* v. *Dept. of Justice*, 3 MSPB 390 (1980); *Pauline Cardullo* v. *Dept. of the Navy*, 3 MSPB 140 (1980); *Mabel M. Charles* v. *Dept. of the Navy*, 3 MSPB 224 (1980); *Laverne Chisholm* v. *Defense Logistics Agency*, 3 MSPB 273 (1980); *Richard Y. Christian* v. *U.S. Postal Service*, 3 MSPB 395 (1980); *Ricky L. Christo* v. *U.S. Postal Service*, 3 MSPB 145 (1980); *Wilma Cofer* v. *Dept. of the Air Force*, 3 MSPB 175 (1980); *James E. Cohill* v. *Dept. of the Army*, 3 MSPB 330 (1980); *Marion J. Coleman* v. *Dept. of the Army*, 3 MSPB 26 (1980); *Daniel P. Croken* v. *U.S. Postal Service*, 3 MSPB 238 (1980); *Danny Cuellar* v. *U.S. Postal Service*, 3 MSPB 244 (1980); *Francis C. Cunningham* v. *Interstate Commerce Commission*, 3 MSPB 473 (1980); *James Cunningham* v. *Dept. of Health, Education, & Welfare*, 3 MSPB 27 (1980); *Elbert T. Davis, Jr.* v. *Dept. of the Air Force*, 3 MSPB 213 (1980); *Calvin O. Decker* v. *Dept. of the Air Force*, 3 MSPB 55 (1980); *Patricia A. Dejoy* v. *Dept. of Health and Human Services*, 3 MSPB 96 (1980); *Charles M. Dickinson* v. *Dept. of Energy*, 3 MSPB 335 (1980); *Joseph Doyle* v. *Veterans Administration*, 3 MSPB 136 (1980); *Elijah Drayton* v. *Dept. of the Navy*, 3 MSPB 57 (1980); *Ralphfel Foley* v. *Veterans Administration*, 3 MSPB 494 (1980); *Andrew F. Francetich* v. *Dept. of the Air Force*, 3 MSPB 456 (1980); *Michael U. Fuiava* v. *Dept. of Justice*, 3 MSPB 217 (1980); *William Grant* v. *Dept. of the Navy*, 3 MSPB 42 (1980); *Kevin Green* v. *U.S. Postal Service*, 3 MSPB 403 (1980); *Michael E. Hadley* v. *Dept. of the Navy*, 3 MSPB 51 (1980); *Donald E. Harvey* v. *Veterans Administration*, 3 MSPB 39 (1980); *James F. Hayes* v. *National Aeronautics and Space Administration*, 3 MSPB 1 (1980); *Betty M. Hobson* v. *Dept. of the Navy*, 3 MSPB 79 (1980); *Richard T. Holland* v. *Dept. of the Treasury*, 3 MSPB 15 (1980); *Andrew K. Holt* v. *Dept. of the Treasury*, 3 MSPB 130 (1980); *Henry S. Humphries* v. *Veterans Administration*, 3 MSPB 80 (1980); *Brian K. Hurst* v. *General Services Administration*, 3 MSPB 21 (1980); *William C. Jackson* v. *Dept. of Agriculture*, 3 MSPB 176 (1980); *Jeanne F. Jeffery* v. *Dept. of the Treasury*, 3 MSPB 479 (1980); *Ronald S. Jones* v. *Veterans Administration*, 3 MSPB 182 (1980); *Thomas F. Kennedy* v. *Dept. of the Treasury*, 3 MSPB 519 (1980); *Adam R. Klimek* v. *Dept. of the Army*, 3 MSPB 248 (1980); *John F. Leonard* v. *U.S. Postal Service*, 3 MSPB 251 (1980); *Billy J. Link* v. *Dept. of the Navy*, 3 MSPB 287 (1980); *Raphael E. Maiers* v. *Dept. of the Air Force*, 3 MSPB 463 (1980); *Alvan T. Majors* v. *U.S. Postal Service*, 3 MSPB 254 (1980); *Charles F. Marshall* v. *U.S. Postal Service*, 3 MSPB 91 (1980); *Wallace M. Mayo* v. *U.S. Postal Service*, 3 MSPB 525 (1980); *William S. McJunckins* v. *Dept. of the Treasury*, 3 MSPB 496 (1980); *Larry W. Meier* v. *Dept. of the Interior*, 3 MSPB 341 (1980); *Harry P. Miller* v. *Federal Deposit Insurance Corporation*, 3 MSPB 416 (1980); *Judith M. Mills* v. *Dept. of Health, Education, & Welfare*, 3 MSPB 151 (1980); *Catherine E. Mooney* v. *Office of Personnel Management*, 3 MSPB 514 (1980); *Albert Newby, Jr.* v. *Dept. of the Navy*, 3 MSPB 498 (1980); *Lawrence Oldham* v. *Veterans Administration*, 3 MSPB 293 (1980); *Rhoda G. Ott* v. *Dept. of the Navy*, 3 MSPB 104 (1980); *Herbert J. Pederson* v. *Dept. of Health, Education, & Welfare*, 3 MSPB 106 (1980); *Anthony T. Pezza* v. *Dept. of Health and Human Services*, 3 MSPB 167 (1980); *Mary C. Pittman* v. *Office of Personnel Management*, 3 MSPB 68 (1980); *Nathan G. Polite* v. *Dept. of the Navy*, 3 MSPB 486 (1980); *Steven D. Powell* v. *Dept. of the Interior*, 3 MSPB 35 (1980); *William Powers* v. *Dept. of Health, Education, & Welfare*, 3 MSPB 424 (1980); *Lyman N. Price* v. *Veterans Administration*, 3 MSPB 206 (1980); *Thomas A. Quarry* v. *General Accounting Office*, 3 MSPB 299

(1980); *Harold M. Ray* v. *Dept. of the Army,* 3 MSPB 86 (1980); *Herman J. Redding* v. *Dept. of the Interior,* 3 MSPB 489 (1980); *John J. Robinson* v. *Dept. of Health, Education, & Welfare,* 3 MSPB 215 (1980); *Kevin P. Rose.* v. *Dept. of the Navy,* 3 MSPB 500 (1980); *Price Ross, Jr.* v. *Dept. of the Army,* 3 MSPB 208 (1980); *William H. Russo* v. *Veterans Administration,* 3 MSPB 427 (1980); *Raymond H. Santiago, Jr.* v. *Dept. of the Air Force,* 3 MSPB 528 (1980); *Hilda B. Schulz* v. *Veterans Administration,* 3 MSPB 14 (1980); *Martin W. Schwartz* v. *Office of Personnel Management,* 3 MSPB 258 (1980); *Victor T. Seales* v. *U.S. Postal Service,* 3 MSPB 134 (1980); *Robert A. Sessler* v. *Dept. of Health and Human Services,* 3 MSPB 530 (1980); *Darrel F. Shepard* v. *Dept. of Agriculture,* 3 MSPB 49 (1980); *Evelyn Simpson* v. *Defense Logistics Agency,* 3 MSPB 154 (1980); *Patrice Smith* v. *Dept. of Health, Education, & Welfare,* 3 MSPB 3 (1980); *Ronald E. Spatz* v. *Dept. of Health, Education, & Welfare,* 3 MSPB 108 (1980); *Walter Szczerbiak* v. *U.S. Postal Service,* 3 MSPB 82 (1980); *Larry Taggart* v. *U.S. Postal Service,* 3 MSPB 220 (1980); *Elizabeth Tillery* v. *Dept. of Defense,* 3 MSPB 6 (1980); *Alan Van Winkle* v. *Veterans Administration,* 3 MSPB 306 (1980); *Patsy Vandiver* v. *General Accounting Office,* 3 MSPB 158 (1980); *David R. Vick* v. *Dept. of the Navy,* 3 MSPB 445 (1980); *Emma Wells* v. *Dept. of the Navy,* 3 MSPB 380 (1980); *Thaddeus Wiecek* v. *Dept. of Justice,* 3 MSPB 532 (1980); *Maggie J. Wilkins* v. *Dept. of the Air Force,* 3 MSPB 447 (1980); *William Woodcock* v. *Social Security Administration,* 3 MSPB 518 (1980); *Edwin C. Wright, Jr.* v. *Dept. of the Navy,* 3 MSPB 184 (1980); *Jim J. Youraine* v. *Dept. of the Navy,* 3 MSPB 23 (1980); *Israel Zidele* v. *Defense Contract Administration,* 3 MSPB 448 (1980).

10.133 Board Review Powers

Ricky L. Christo v. *U.S. Postal Service,* 3 MSPB 145 (1980).

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10.2121 Initial Stay—Section 1208(a)

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10.21211 Filing of Request for Stay

10.2122 Extension of Initial Stay—Section 1208(b)

In re *Richard C. Curtis*, 3 MSPB 32 (1980).

10.21221 Filing of Request for Extension of Stay

10.21222 Agency Response

In re *Richard C. Curtis*, 3 MSPB 32 (1980); In re *Manuel Munoz*, 3 MSPB 482 (1980).

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In re *John W. King*, 3 MSPB 29 (1980).

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10.430 Other Representation

Kenneth L. Berry v. *Veterans Administration*, 3 MSPB 332 (1980); *Jimmie R. Price* v. *Dept. of the Treasury*, 3 MSPB 314 (1980); *Owen Sweeney* v. *Dept. of the Treasury*, 3 MSPB 321 (1980).

10.440 Conflict of Interest

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10.500 EX PARTE CONDUCT

10.600 SUBSTITUTION OF PARTIES

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Laverne Chisholm v. *Defense Logistics Agency*, 3 MSPB 273 (1980); *Dalton Pixler* v. *Veterans Administration*, 3 MSPB 63 (1980).

10.720 Estoppel

Laverne Chisholm v. *Defense Logistics Agency*, 3 MSPB 273 (1980).

10.800 GENERAL BOARD POWERS

10.810 Waiver of Board Regulations

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10.820 Waiver of Non-Statutory Requirements in Board Orders

11.000000 Prohibited Personnel Practices

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12.112 Grade Retention

Jackie L. Wilson v. *Dept. of the Navy*, 3 MSPB 382 (1980).

12.113 Pay Retention

Jackie L. Wilson v. *Dept. of the Navy*, 3 MSPB 382 (1980).

12.114 Retreat Rights
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James E. Butler v. *Dept. of the Interior*, 3 MSPB 534 (1980); *Robert Compton* v. *Dept. of Energy*, 3 MSPB 522 (1980); *Leonie G. Mallory* v. *Dept. of the Navy*, 3 MSPB 100 (1980); *E. Arthur Patterson* v. *Dept. of the Interior*, 3 MSPB 172 (1980).

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12.210 Competitive Area

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12.220 Competitive Level

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14.500 ATTORNEY FEES

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14.510 Statutory Authorization

Richard A. Frost v. *Dept. of the Navy,* 3 MSPB 226 (1980).

14.520 Interest of Justice

Nemours T. Bourg v. *Dept. of Housing & Urban Development,* 3 MSPB 502 (1980); *Dorothy H. Smith* v. *Veterans Administration,* 3 MSPB 432 (1980); *Keith H. Stout* v. *U.S. Postal Service,* 3 MSPB 440 (1980); *William Trowell* v. *U.S. Postal Service,* 3 MSPB 117 (1980).

14.521 Prohibited Personnel Practice
14.522 Clearly Without Merit

Keith H. Stout v. *U.S. Postal Service,* 3 MSPB 440 (1980).

14.523 Bad Faith
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Catherine Mooney v. *Office of Personnel Management,* 3 MSPB 514 (1980); *Edsel L. Corpe* v. *Office of Personnel Management,* 3 MSPB 504 (1980).

15.130 Disability Retirement

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Martin W. Schwartz v. *Office of Personnel Management,* 3 MSPB 258 (1980).

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In re *Richard C. Curtis*, 3 MSPB 32 (1980).

16.120 Investigation of Whistleblower Allegations

John Ceraso v. *Dept. of the Army*, 3 MSPB 180 (1980).

16.130 Investigation of Political Activities

16.131 Hatch Act Violations
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16.140 Investigation of Information Withholding

16.150 Investigation of Civil Service Violations

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In re *Charles B. Coffield*, 3 MSPB 46 (1980); In re *Manuel Munoz*, 3 MSPB 482 (1980).

16.231 Reasonable Grounds

In re *Charles B. Coffield*, 3 MSPB 46 (1980).

16.232 Burden of Proof
16.2321 Section 1208(a)—15 days

In re *Charles B. Coffield*, 3 MSPB 46 (1980).

16.2322 Section 1208(b)—30 days

In re *Charles B. Coffield*, 3 MSPB 46 (1980).

16.2323 Section 1208(c)—Indefinite

In re *Charles B. Coffield*, 3 MSPB 46 (1980).

16.240 Intervention Before MSPB

In re *Charles B. Coffield*, 3 MSPB 312 (1980).

16.250 Disciplinary Actions Against Employees
16.251 Arbitrary and Capricious Withholding
16.252 Financial Privacy Violations
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16.2531 Federal Employees
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16.300 FILING OF COMPLAINTS BEFORE SPECIAL COUNSEL

16.310 Place of Filing

16.320 Form and Contents

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17.181 Nature of Position
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17.186 Contributing Social or Environmental Conditions
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17.200 STANDARD APPLIED IN SUITABILITY DETERMINATION

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ALPHABETICAL LIST OF WORDS AND PHRASES

(Cross-Referenced to Key Numbers)

ABANDONMENT OF POSITION: *See* 1.310 (Adverse Actions, Substantive Charges, Attendance Related).

ABOLISHMENT OF POSITION: *See* 12.111 (Reduction in Force, Actions, Change of Positions or Reclassification).

ABSENCE WITHOUT LEAVE: *See* 1.311 (Adverse Actions, Substantive Charges).

ABUSE OF AUTHORITY: *See* 1.361 (Adverse Actions, Substantive Charges); 11.1513 (Prohibited Personnel Practices, Definition of).

ABUSE OF LEAVE: *See* 1.3112 (Adverse Actions, Substantive Charges).

ACCEPTABLE LEVEL OF COMPETENCE: *See* 9.2141 (Performance Related Actions, Employee Performance Evaluation).

ACCESS, DENIAL OF: *See* 5.320 (Privacy Act).

ADMINISTRATIVE ERROR: *See* Harmful Error.

ADMINISTRATIVE LAW JUDGE: *See* 6.114 (Jurisdiction, Original); 8.100 (Particular Employment Categories, Original Jurisdiction Actions); 10.220 (Practice and Procedure, Original Jurisdiction, Cases); 10.300 (Cases Heard by).

ADMINISTRATIVE NOTICE: *See* 10.1211 (Practice and Procedure, Presiding Official, Discretion).

ADMINISTRATIVE PROCEDURE: *See* 2.130 (Constitutionality, Due Process).

ADMINISTRATIVE REGULATION: *See* 13.000000 (Regulation Review).

ADMINISTRATIVE RULES: *See* 13.000000 (Regulation Review).

ADMISSIBILITY: *See* 4.100 (Evidence).

ADMISSIONS: *See* 4.111 (Evidence, Prehearing).

ADVERSE ACTIONS: *See* 1.000000 (Generally); 6.121 (Jurisdiction, Appellate); 7.115 (Labor-Management Relations, Grievance Procedures).

ADVISORY OPINIONS: *See* 6.720 (Jurisdiction, Justiciability, Ripeness); 16.253 (Special Counsel, Prosecution, Hatch Act Violations).

AFFIDAVITS: *See* 4.112 (Evidecne, Prehearing).

AFFIRMATIVE ACTION: *See* 3.300 (Discrimination).

AFFIRMATIVE DEFENSES: *See* 1.430 (Adverse Actions, Disparate Treatment of Similarly Situated Employees); 2.000000 (Constitutionality); 3.000000 (Discrimination); 6.000000 (Jurisdiction); 7.000000 (Labor-Management Relations); 9.000000 (Performance Related Actions); 10.000000 (Practice and Procedure); 11.000000 (Prohibited Personnel Practices); 12.000000 (Reductions in Force); 17.000000 (Suitability and Fitness for Duty Examinations).

AGE DISCRIMINATION: *See* 3.110 (Discrimination, Prohibited); 7.3245 (Labor-Management Relations, Labor Organization Unfair Labor Practices, Discrimination); 11.131 (Prohibited Personnel Practices, Discrimination).

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967: *See*

3.111 (Discrimination, Age). *See also* Age Discrimination.
AGENCY PROCEDURES: *See* Harmful Error.
AIR TRAFFIC CONTROLLERS: *See* 15.142 (Retirement, Requirements, Mandatory Separation).
ALCOHOL AND DRUG ABUSE: *See* 1.320 (Adverse Action, Substantive Charges); 3.1313 (Discrimination, Prohibited, Handicapping Condition); 7.3249 (Labor-Management Relations, Labor Organization Unfair Labor Practices, Discrimination); 11.133 (Prohibited Personnel Practices, Discrimination). *See also* Alcoholism, Drug Abuse.
ALCOHOLISM: *See* 17.140 (Suitability, Criteria). *See also* Alcohol and Drug Abuse.
ANNUAL LEAVE: *See* 1.312 (Adverse Actions, Substantive Charges, Abuse of Leave).
ANNUITY: *See* 15.200 (Retirement).
APPEALS: *See* 5.321 (Privacy Act, Denial of Access); 6.120 (Jurisdiction, Appellate); 6.330 (Presiding Official Decisions); 8.530 (Particular Employment Categories, Senior Executive Service); 9.316 (Performance Related Actions, Unacceptable Performance, Reduction in Grade or Removals); 9.325 (Unacceptable Performance, Denial of Within Grade Increase); 12.420 (Reductions in Force); 15.1321 (Retirement, Requirements, Disability); 15.203 (Annuities); 16.211 (Special Counsel, Prosecution, Referral to Agency Heads).
APPELLATE JURISDICTION: *See* 6.120 (Generally); 10.110 (Practice and Procedure).
APPLICANT: *See* 8.310 (Particular Employment Categories, Special Situations); 17.000000 (Suitability).
APPOINTMENT: *See* Applicant; Suitability.
ARBITRARY ACTION: *See* Arbitrary, Capricious, or Abuse of Discretion.
ARBITRARY AND CAPRICIOUS WITHHOLDING: *See* 16.251 (Special Counsel, Prosecution, Disciplinary Actions Against Employees).
ARBITRARY, CAPRICIOUS, OR ABUSE OF DISCRETION: *See* 4.230 (Evidence, Burdens of Proof).
ARBITRATION AND ARBITRATORS: *See* 7.112 (Labor-Management Relations, Grievance Procedures); 7.1142 (Actions Based on Unacceptable Performance); 7.1152 (Adverse Actions).
ASSIGNMENT: *See* 12.110 (Reductions in Force, Actions).
ATTORNEY FEES: *See* 14.500 (Remedies).
ATTORNEY REPRESENTATION: *See* 10.420 (Practice and Procedure, Representation).
AWARDS: *See* 9.2142 (Performance Related Actions, Appraisal Systems, Evaluation).
BACKPAY: *See* 14.110 (Remedies, Reinstatement).
BAD FAITH: *See* 14.513 (Remedies, Attorney Fees).
BASIC PAY: *See* 8.500 (Particular Employment Categories, Senior Executive Service); 8.600 (Merit Pay); 15.201 (Retirement, Annuities, Determinations of).
BIAS: *See* 8.122 (Particular Employment Categories, Administrative Law Judges, Good Cause); 10.122 (Practice and Procedure, Presiding Official).
BOARD REVIEW: *See* 10.130 (Practice and Procedure).
BONA FIDES: *See* 14.513 (Remedies, Attorney Fees, Bad Faith).
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ERRATA

(Volumes 1 and 2)

Volume 1

Page No.	*Correction*
xii	Fourth caption from top of page: volume-page citation in parentheses should read "(1:159, 196)"
123	5th full paragraph, first line: "persons" should read "person"
124	5th line from top of page: "thorugh" should read "through"
126	1st full paragraph, 16th line: "satutory" should read "statutory"
127	1st full paragraph, 2nd line: Insert comma between "other" and "so"
152	3rd full paragraph, line 2: "repondents" should be "respondents"
154	Footnote, line 7: "dsciplinary" should be "disciplinary"
160	2nd full paragraph, 4th line: Capitalize "Marshals"
162	1st full paragraph, penultimate line: "appeal" should read "appear"
165	3rd full paragraph, 3rd line: Delete comma appearing between "that" and "other deputies"
171	Footnote 20: Insert after last sentence "[cont'd]"
174	3rd full paragraph, 2nd line: "incuded" should read "included"
177	16th line from top of page: Citation should read "(D. C. Cir. 1977)"
181	1st full paragraph, 9th line: Insert "the" between "that" and "four deputies"
216	2nd full paragraph, 8th line: Delete period, insert comma after phrase "On the contrary"

Page No.	*Correction*
216	3rd full paragraph, 1st line: "OPM" should read "OPM's"
225	1st full paragraph, 6th line: "etablishment" should read "establishment"
226	1st full paragraph, 13th line: Delete duplicate comma after "systems,"
227	1st full paragraph, 2nd line: "procesures" should read "procedures"
228	2nd full paragraph, 7th line: Insert single space and quotation marks before ". . . employees"
229	Footnote 71, penultimate line: Delete duplicate comma after "§ 2302,"
230	Footnote 75: Delete duplicate parenthesis before "(Senate Report)"
230	Footnote 78, 2nd line: "systems" should read "system"
230	Footnote 79, 3rd line: "operation defects" should read "operational defects"
231	3rd full paragraph, 3rd line: Insert "the" between "related to" and "job"
231	3rd full paragraph, 6th line: "systems" should read "system"
231	Footnote 80, 5th line: "suggestions" should read "suggestion"
234	1st full paragraph, 1st line: Insert "w" to read "The Mathias amendment was adopted,"
234	2nd full paragraph, 4th line: Insert apostrophe to read "Board's"
234	2nd full paragraph, 8th line: Change period after "Group" to comma
235	4th full paragraph, 6th line: Insert "s" to read "both sections the term"
235	4th full paragraph, 10th line: Insert comma to read "However,"
237	3rd full paragraph, 3rd line: "proposed order from" should read "proposed order for"
269	1st full paragraph, 2nd quoted paragraph, 2nd line: "rules" should read "ruled"
306	2nd full paragraph, 2nd line: Capitalize "Management"
307	1st full paragraph, 3rd line: Insert comma after section cite to read "2101.3(a)(8)),"
429	2nd full paragraph, 1st line: "Boards" should read "Board's"
497	Footnote 10, 1st line: Should read "See pages 491-492, supra."
501	3rd full paragraph, 9th line: Insert comma after section cite to read "§ 4301(3),"

Page No.	*Correction*
508	1st full paragraph, 9th line: Insert comma after "evidence"
536	2nd paragraph, line 10: "appellant" should read "appellate"
	Volume 2
xi	11th Caption from top of page: Should be listed in bold type; Insert volume and page number in parentheses after date of decision to read "(2:20)"
96	2nd full paragraph, 1st line: "We being" should read "We begin"
96	3rd full paragraph, 10th line: "not file" should read "not filed"
97	1st full paragraph, 20th line: "intial" should read "initial"
98	1st full paragraph, 5th line: Capitalize beginning of sentence to read "However,"
103	4th full paragraph, 2nd line: "is" should read "in"
103	4th full paragraph, 4th line: "render" should read "renders"
189	1st full paragraph, last line: Delete duplication of phrase "basis of the appeal."
189	3rd full paragraph, 6th line: "apellate" should read "appellate"
228	1st full paragraph, 10th line: "refered" should read "referred"; also, Insert "the" to read "submitted with the petition"
259	1st full paragraph, last line: Delete duplicate word "requests."
263	1st full paragraph, 7th line: "his" should read "is"
264	3rd full paragraph, 6th line: Insert period after "rationality"; begin new sentence with "As explained"
267	1st full paragraph, 3rd line: "base" should read "bare"
267	2nd full paragraph, 2nd line: "were" should read "was"
268	3rd line from top of page: begin new paragraph with "Integral to"
268	4th line from top of page: "discrimintation" should read "discrimination"
294	3rd full paragraph, 5th line: "inference" should read "interference"

Page No.	*Correction*
298	4th full paragraph, 5th line: "jurisdictions" should read "jurisdiction"
335	1st full paragraph, penultimate line: "agancy's" should read "agency's"
335	Footnote 1, 2nd line: "his" should read "him"
336	1st full paragraph, 3rd line: "industrial-commerical" should read "industrial-commercial"
336	2nd full paragraph, 1st line: "petitioner's" should read "petitioners'"
364	2nd full paragraph, 6th line: Delete comma after "position" and insert "to duplicate hers, transferring her duties to that new position,"
366	1st full paragraph, last line: Insert period after "§ 351.201(a)"
366	Footnote 6, 3rd line: "on" should read "in"
435	Footnote, 3rd line: Delete comma appearing between "remand" and "the appeal"
492	3rd full paragraph, 1st line: "had" should read "has"
492	3rd full paragraph, 4th line: "absences" should read "absence"
572	2nd full paragraph, 3rd line: "empowerd" should read "empowered"
587	1st full paragraph, penultimate line: Delete "MSPB Docket No. AT075299048"
607	Last paragraph, penultimate line: "arugments" should read "arguments"
608	3rd full paragraph, 2nd line: "Neverhteless" should read "Nevertheless"
611	1st full paragraph, last line: Should read "¶ 8875 at 5618 (D.D.C. 1979)."
612	2nd line from top of page: "services is" should read "services in"
620	2nd full paragraph, 1st line: "interim" should read "initial"
622	3rd full paragraph, 10th line: "case" should read "cases"
624	Footnote 5, 8th line: Insert after "fee" the following: "award. Agencies and their representatives should therefore be"

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